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No. 07-

IN THE

Supreme Court of the United States

JAMES D. MINCH and RICHARD A. GRAF,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CLINTON A. KRISLOV
Counsel of Record
MICHAEL R. KARNUTH
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive
Chicago, Illinois 60606
(312) 606-0500

Attorneys for Petitioners

212010

COUNSEL PRESS
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QUESTION PRESENTED

Whether city employees covered by a collective bargaining agreement that permits discharge only "for cause", and explicitly prohibits both age discrimination and the enactment of laws diminishing rights under the agreement, have a protected property interest in continued employment, protectable by due process, over the city's subsequently enacted age 63 mandatory retirement law?

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Petitioners James D. Minch and Richard A. Graf respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit, which affirmed the order of the United States District Court for the Northern District of Illinois granting dismissal of Petitioners' Procedural Due Process claims brought under the Fourteenth Amendment of the U.S. Constitution.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit, on which petitioners pray for certiorari, is reported at *Minch v. City of Chicago*, 486 F.3d 294 (7th Cir. 2007), and is reproduced at App. A.

The January 3, 2005 Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (DerYeghiayan, J.), granting the City's motion to dismiss, is unofficially reported at 2005 WL 78945 and is reproduced at App. C. The district court's May 10, 2005 Memorandum Opinion and Order denying petitioner's motion for reconsideration of its January 3, 2005 decision is unpublished and is reproduced at App. B.

The March 26, 2002 Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Bucklo, J., predecessor to DerYeghiayan, J.), granting in part and denying in part the City's motion to dismiss, is reported at *Drnek v. City of Chicago*, 192 F. Supp. 2d 835 (N.D. Ill. 2002), and is reproduced at App. D.

The unpublished Order of the Court of Appeals for the Seventh Circuit denying Petitioners' request for rehearing is reproduced at App. E.

JURISDICTION

The Opinion of the Seventh Circuit Court of Appeals was entered on May 14, 2007. Petitioners' timely request for rehearing and *en banc* review was denied on June 11, 2007. Petitioners' timely request for an extension of time within which to file their petition was granted by Justice Stevens on September 7, 2007, making their petition due on November 8, 2007.

Jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court with respect to Petitioners' due process claims was based on 28 U.S.C. § 1331.

RULE, CONSTITUTIONAL PROVISION, AND STATUTES INVOLVED

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move for the dismissal of a pleading for "failure to state a claim upon which relief can be granted."

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

U.S.C.A. Const. Amend. XIV.

The Municipal Code of Chicago, Ill. § 2-152-140 (rev. 2000) ("Mandatory Retirement Ordinance"), provides, in pertinent part:

* * *

> (b) Effective December 31, 2000, the age of sixty-three shall be the maximum age for employment of any member of the uniformed service of the Fire Department, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred or appointed to a supervisory or administrative position.
>
> * * *
>
> (d) All persons to whom this ordinance applies shall be retired upon attainment of age 63. Any person to whom this ordinance applies whose age is 63 or more on December 31, 2000 shall be retired upon that date.

Municipal Code of Chicago, Ill. § 2-152-140 (rev. 2000).

The Municipal Code of Chicago, Ill. § 2-160-030 ("Human Rights Ordinance"), provides, in pertinent part:

> Unlawful discriminatory activities designated. No person shall directly or indirectly discriminate against any individual in hiring, classification, grading, discharge, discipline, compensation or other term or condition of employment because of the individual's . . . age.

Municipal Code of Chicago, Ill. § 2-160-030.

STATEMENT OF THE CASE

Petitioners are two former high ranking officers of the City of Chicago's fire department.[1] Petitioners' complaint alleges that the City's Mandatory Retirement Ordinance violates their procedural due process rights under the Fourteenth Amendment of the United States Constitution. Chicago's Mandatory Retirement Ordinance solely targets police officers and firefighters, requiring police officers and uniformed fire department personnel to retire at age 63. Petitioners allege that the ordinance violates their procedural due process rights by involuntarily terminating their employment solely on the basis of their age, in violation of the express terms of the collective bargaining agreement ("CBA") that the City entered into with petitioners.

---

1. Petitioner James D. Minch is a former Battalion Chief and Petitioner Richard A. Graf is a former Captain of the City's fire department.

I. The Collective Bargaining Agreement

On January 14, 1998, the City and the Chicago Firefighters' Union, Local #2 (the "Union"), entered into a collective bargaining agreement which set forth terms and conditions of employment for all uniformed members of the Chicago Fire Department (the "1998 CBA"). The effective date of the 1998 CBA was July 1, 1995 through June 30, 1999, and continued in effect until such time as a new agreement was reached.

The relevant provisions contained within the 1998 CBA included a "No Discrimination" provision, a "Discharge" provision, and a "Guarantee of Terms" provision. Each of these provisions are set forth, in relevant part, below:

> **Article XIII**
> **No Discrimination**
> **Section 13.1** No Discrimination
> . . . In accordance with applicable law, neither the Employer nor the Union shall discriminate against any employee covered by this Agreement because of race, creed, color, national origin, sex, age, religion or political affiliation.
>
> * * *

Article XVI
General Provisions

* * *

Section 16.2 Discipline and Discharge

* * *

B. The Employer agrees that employees shall be disciplined and discharged only for just cause. . . .

* * *

Article XIX
Guarantee of Terms

The Employer agrees that this Agreement shall be immediately submitted to the City Council of the City of Chicago for ratification and concurrent adoption in ordinance form pursuant to the City's Home Rule authority. Such action by the Council shall commit the City of Chicago to enact no subsequent ordinances, executive orders or rules and regulations having the force and effect of law which would impair the binding effect of or make unenforceable the terms of this Agreement.

On July 9, 2003, the City and the Union entered into another collective bargaining agreement with effective dates from July 1, 1999 through June 30, 2007 (the "2003 CBA"). The 2003 CBA included the exact same provisions and language as set forth above. Consequently, unless otherwise specified, all references to the CBA will refer to the 1998 CBA, which hereinafter will be referred to as "CBA."

II. The Mandatory Retirement Ordinance

In 1984, the mandatory retirement age for Chicago police and fire personnel was set at 70 when the Age Discrimination in Employment Act became applicable to states and municipalities. Chicago Municipal Code § 25-37 (1984). The City's mandatory retirement ordinance ended in 1993. Chicago Municipal Code 2-152-140. No mandatory retirement ordinance existed in Chicago between December 31, 1993 and May 17, 2000, when the current ordinance was enacted.[2]

On May 17, 2000, the Chicago City Council passed an ordinance, introduced by Mayor Richard M. Daley, establishing a mandatory retirement age of 63 for

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2. Under a 1996 amendment to the Age Discrimination in Employment Act, 29 U.S.C. § 623(j) *et seq.* ("ADEA"), state and local governments were allowed, but not required, to enact mandatory retirement laws. *See, State Police for Automatic Retirement Ass'n v. DiFava*, 317 F.3d 6, 14 (1st Cir. 2003) ("The language of § 623(j) is permissive not mandatory."). Given that the ADEA amendment made enactment of mandatory retirement laws discretionary, rather than compulsory, the ADEA statute cannot be relied upon as a basis for usurping contract terms which preclude such laws.

Chicago police officers and uniformed fire department personnel. This mandatory retirement ordinance ("MRO") became effective on December 31, 2000.

III. Petitioners' Due Process Claim

Petitioners are two firefighters who challenge their mandatory retirement and the mandatory retirement of other similarly-situated Chicago firefighters pursuant to the MRO, on the grounds that their mandatory retirement deprived them of a property right in continued employment, arising from the terms of the Collective Bargaining Agreement between their Union and the City. Petitioners assert that the City's agreement in the CBA "that employees shall be disciplined and discharged only for just cause . . ." and that "neither the Employer nor the Union shall discriminate against any employee covered by this Agreement because of . . . age . . ." gave them a protected property interest in continuing in their jobs without the threat of mandatory retirement. The Petitioners also assert that under the CBA's "Guarantee of Terms" provision, the City agreed not to enact any subsequent law, such as the MRO, which would impair these property rights, and other rights guaranteed to them under the CBA.

IV. The Decision of the First District Court – Judge Bucklo

On March 26, 2002, following a motion to dismiss by the City directed at petitioners' due process claims, as well as other claims, the District Court (Bucklo, J.) denied dismissal of the firefighter plaintiffs' due process claims. Judge Bucklo held that "[u]nder the CBA, the

firefighter plaintiffs had a legally protected property interest in continued employment", further holding that the CBA's "just cause" and "anti-discrimination" provisions afforded Plaintiffs that interest. *Drnek v. City of Chicago*, 192 F. Supp. 2d 835, 847-48 (N.D. Ill. 2002). Judge Bucklo rejected the City's argument that CBA section 9.1(C)(3) contemplates and allows mandatory retirement. *Id.* That subsection, which expressly addresses "Seniority Rights", not mandatory retirement, states:

> An employee's continuous service and the employment relationship shall be terminated when an employee:
>
> * * *
>
> 3. Retires or is retired;

Judge Bucklo concluded that the passive "is retired" language must be read as subject "to the provision for disciplinary discharge for 'just cause'" and "to the nondiscrimination clause, if either of those provisions is to be afforded any meaning." *Drnek*, 192 F. Supp. 2d at 848.

Judge Bucklo, however, held differently on the police officers' due process claims, which at the time, were being asserted along with petitioners' claims on behalf of firefighters.[3] Based on analysis of the specific language

3. In addition to asserting due process claims, Petitioners and former Chicago police officers also asserted claims pursuant to the Age Discrimination in Employment Act, which the Seventh Circuit previously dismissed in 2004. *See, Minch v. City of Chicago*, 363 F.3d 615 (7th Cir. 2004); *cert denied*, 543 U.S. 876 (2004). Petitioners' (Cont'd)

contained in the police officers' collective bargaining agreements, Judge Bucklo dismissed the police officers' due process claims. *Id.* at 848-49. The police officers' CBA, like the firefighters' CBA, contained a non-discrimination provision, but the language in the police officers' CBA non-discrimination provision included the following limitation: "Nothing in this Agreement shall be deemed to preclude the mandatory retirement of any officer upon or after the attainment of age 63." *Id.* at 848. Judge Bucklo concluded that "[u]nlike the firefighters' CBA, then, the nondiscrimination provision here does not create a property interest in employment after age sixty-three." *Id.*

V. The Decisions of the Successor District Court – Judge Der-Yeghiayan

On May 13, 2004, Judge Samuel Der-Yeghiayan (to whom the case had been randomly reassigned following Judge Der-Yeghiayan's appointment to the bench), directed the City *sua sponte* to file a new motion to dismiss directed at petitioners' due process claims and,

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(Cont'd)

ADEA claims, as the Seventh Circuit recognized in its recent decision, were independent of their due process claims:

> as the plaintiffs point out, our opinion in *Minch I* addressed the ADEA claim alone and had nothing to say on the subject of the due process claim, which was beyond the scope of the interlocutory appeal. . . . But Judge Bucklo articulated other reasons for sustaining the viability of the due process claim that were entirely independent of the ADEA claim. *Id.* at 847-48. Our decision in *Minch I* did not implicate those additional grounds and thus did not necessitate a wholesale re-examination of the due process claim.

Minch, 486 F.3d at 301.

on January 3, 2005, granted the City's motion to dismiss with prejudice. Judge Der-Yeghiayan ruled that the City's MRO terminated any protected property interest in continued employment beyond age 63 that Petitioners may have been afforded under the CBA. This decision conflicted with Judge Bucklo's March 26, 2002 order, which sustained those same claims. With respect to the CBA's "just cause" provision, Judge Der-Yeghiayan held that this provision was limited "to disciplinary actions taken against employees and it is not applicable in the instant action because none of the Petitioners claim that they were forced into mandatory retirement as part of a disciplinary measure for misconduct." Judge Der-Yeghiayan also concluded, contrary to Judge Bucklo's order, that the CBA's "Seniority Rights" provision, section 9.1(C)(3), enables the City to enforce mandatory retirement because the "just cause" provision of section 16.2(B) does not apply to that section.

With respect to the CBA's anti-discrimination provision, Judge Der-Yeghiayan concluded that the only "proper claim" Petitioners could raise under that provision "would be an ADEA claim" and since the Seventh Circuit previously dismissed Petitioners' ADEA claims, no claim remained.

On May 10, 2005, Judge Der-Yeghiayan denied Petitioners' Motion for Reconsideration, including petitioners' requests to replead, relying on the same bases set forth in his January 3, 2005 decision.

VI. The Decision of the Seventh Circuit

Petitioners appealed Judge Der-Yeghiayan's decisions to the U.S. Court of Appeals for the Seventh Circuit. On May 14, 2007, the Seventh Circuit affirmed Judge Der-Yeghiayan's decisions.

Since Petitioners' claims were dismissed on a Motion to Dismiss, the factual record has not been fully developed. However, when the case was before Judge Bucklo, the district court, exercising the utmost caution before ruling on the City's motion, required Petitioners to demonstrate that they had factual support for their allegations that the City passed the MRO as a subterfuge, and found that hurdle was met. Citing published reports quoting City officials, Petitioners presented City Council statements showing discriminatory intent that the MRO was enacted "as a way to create hiring and promotional opportunities in the fire department and police department for the benefit of younger employees," "for the benefit of creating some job openings for minorities in those departments," and for the purpose of getting rid of the so-called "deadbeats" and "old-timers" in the departments. For example, the Mayor, who introduced the Ordinance to the City Council, was quoted in news reports as saying he pushed the retirement age because "it was the right thing to do. We need to bring new life and more diverse leadership into the Police and Fire departments." He announced the introduction of the MRO by saying that it "would open up managerial positions for the younger rank and file." The Chairman of the City Council's Police and Fire Committee, who sponsored the Ordinance, was quoted as saying, "At 63, it is time to go in the fire department. This gives the

younger guys an opportunity to get promoted. This is very important; it motivates them to do better." Later, he said, "[The MRO] gives young guys the opportunity to get promoted and would allow removal of 'deadbeats' in the senior ranks in the troubled Fire Department."

During the evidentiary hearing no evidence was introduced by the City to show that mandatory retirement was agreed to by Petitioners or their Union, or otherwise allowed under the CBA. Indeed, in response to the City's enactment of its mandatory retirement ordinance, Petitioners filed grievances which were denied by the City as "not grievable." Following the City's rejection of Petitioners' grievances, the Union filed a grievance on behalf of Petitioners and those grievances have never been heard.

Since the City's implementation of mandatory retirement at the end of the year 2000, hundreds of Chicago's firefighters, age 63 and older but indisputably still capable and competent, have been involuntarily forced to retire in violation of the rights afforded them under the CBA. Petitioners ask this Court for review of the Seventh Circuit's decision holding that the language of petitioners' CBA did not afford them a property interest in continued employment and a right to constitutional due process to protect that interest.

REASONS FOR GRANTING THE PETITION

1. The Seventh Circuit's Holding Is Contrary To This Court's "Legitimate Claim of Entitlement" Test For Due Process Claims.

In erroneously determining that the firefighter petitioners lacked a property interest under their collective bargaining agreement, the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court.

According to well-established precedent of this Court, to have a property interest in a benefit or job, a party must only have a "*legitimate* claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis supplied).

While the Seventh Circuit, on a motion to dismiss, used a strained and incorrect interpretation of the collective bargaining agreement to dismiss petitioners' claims of a property interest, it also strayed from applying the proper question under Supreme Court precedent, of whether the petitioners had a "legitimate claim of entitlement" to their employment. That question should have been answered by determining whether the collective bargaining agreement could "legitimately" or fairly be read to provide an entitlement to continued employment – not by determining, as the Court of Appeals did here, whether the collective bargaining agreement might be interpreted in a way which would make the firefighters' mandatory retirement permissible.

The Seventh Circuit's analysis was inconsistent with the teachings of this Court's due process cases, which require a more flexible, less rigid, approach, affording some deference to the reasonable expectations and understandings of the party asserting the property interest. While this Court has explained that a "legitimate claim of entitlement" is something more than an "abstract need or desire" or a "unilateral

expectation," it stopped short of saying that the petitioner's claim of entitlement had to be beyond dispute in order to be "legitimate." Indeed, this Court's ruling in *Perry v. Sindermann*, 408 U.S. 593 (1972), made it clear that the opposite is true, suggesting that if a contract can fairly be read to support a property interest, then the plaintiff has a "legitimate claim of entitlement."

The *Perry* Court, in reviewing a decision on summary judgment, found that there was a genuine issue of material fact about whether the plaintiff had a "legitimate claim of entitlement," to his job. In remanding the case, the *Perry* Court found that rules and understandings between the parties, even though the subject of disagreement between Sindermann and his employer, could still justify a "legitimate claim of entitlement to continued employment." 408 U.S. at 602. Accordingly, the Court remanded the case to give Sindermann the "opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'" 408 U.S. at 603.

2. The Seventh Circuit's Standard Inappropriately Bars Petitioners From Proving Their Due Process Claims.

In taking its inquiry beyond the question of whether petitioners had a "legitimate claim of entitlement to continued employment," the Court of Appeals also strayed from Supreme Court precedent in another key respect, by erroneously leaping to the ultimate question of whether petitioners' mandatory retirement was permissible, and making this finding on a bare motion to dismiss. This was the ultimate question that should have been decided *if* petitioners had been properly afforded due process when they were involuntarily retired, but was not the question for the court to decide here. As this Court explained in remanding the *Perry* case: "proof of such a property interest would not, of course, entitle [Sindermann] to reinstatement. But such proof would

obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

3. The Seventh Circuit's Standard Permits Government Entities To Legislatively Extinguish Property Rights They Have Privately Conveyed To Its Employees In A Collective Bargaining Agreement.

This case also raises an important question of federal law which this Court has not specifically addressed: whether a property interest in continued employment arising from "just cause" and anti-discrimination provisions contained in a collective bargaining agreement is insulated from unilateral, legislative action by the government party to the agreement, when that agreement includes a "guarantee of terms" provision that promises not to impair its terms.

The Seventh Circuit's decision creates an inappropriate standard that permits government entities to ignore a contractual promise not to impair bargained-for rights, and usurp "just cause," "anti-discrimination" and other collective bargaining provisions that this Court and other circuit courts have held create protected property rights in continued employment, by allowing subsequently enacted involuntary termination laws, such as the Mandatory Retirement Ordinance here, to supplant them, if such laws were not specifically and expressly prohibited within the agreement.

The Seventh Circuit's standard fails to give weight to express contractual language which, as here, unambiguously provides protected property rights, and instead allows government entities to unilaterally and legislatively create exceptions to those rights if such exceptions are not expressly prohibited. This conflicts with principles set forth by this Court, the Second Circuit's decision in *Ciambriello v. County of Nassau*, 292 F.3d 307 (2d Cir. 2002), and holdings of other Circuits.

I. The Seventh Circuit Misapplied Supreme Court Precedent In Determining That Petitioners Lacked A Property Interest

A. The Seventh Circuit Failed To Properly Assess Petitioners' Case Under The "Legitimate Claim Of Entitlement" Standard

The Seventh Circuit ruled out the existence of a property interest in this case, not by appropriately answering the question of whether explicit protections in the contract (i.e., the guarantee to continued employment absent just cause and the prohibition on age discrimination) gave Petitioners a "legitimate claim of entitlement to continued employment," but by erroneously developing its own rule that these explicit protections are insufficient to provide a property interest in future employment when there is no express prohibition on mandatory retirement in the agreement.

The Seventh Circuit's tortured reading of the contract evidenced a misunderstanding of the standards for finding a property interest in a due process case. The question for the court to decide, particularly on a motion to dismiss,[4] is not whether there is one possible interpretation of a CBA under which it could find that

4. The Seventh Circuit also ventured far from the rule that it should only dismiss the complaint if plaintiffs could prove no set of facts on which relief could be granted, by interpreting the CBA as if it could only fairly be interpreted in one way. The court inferred that mandatory retirement was permitted by the CBA, even though not expressly stated there, and even though other broadly written provisions in the agreement suggested that any form of discharge absent just cause, or on the basis of age discrimination, was strictly forbidden.

no property interest exists, but rather whether there is a fair interpretation of the CBA that would give the plaintiffs a "legitimate claim of entitlement to continued employment." *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *Perry*, 408 U.S. at 602. By focusing solely on whether express prohibitions to mandatory retirement existed in the CBA, the Seventh Circuit failed to recognize that the "just cause", anti-discrimination and "guarantee of terms" provisions inherently barred the City's efforts to enforce age-based involuntary terminations.

In support of its ruling, the Seventh Circuit interpreted provisions of the CBA that related solely to when seniority ends – provisions that included reference to various types of job abandonment and voluntary terminations and when precisely they would trigger both an end to employment and seniority accrual – to suggest that since the CBA allowed for discharge due to job abandonment and voluntary termination, then it must also allow for involuntary retirement. *Minch*, 486 F.3d 303-04. But unlike the careful crafting that went into defining how many days of absence constitute job abandonment for seniority purposes, there is no mention of mandatory retirement anywhere in the agreement.

When a collective bargaining agreement contains protections that are clearly and broadly stated, other vague or ambiguously-stated provisions such as the "seniority" provision relied on by the Seventh Circuit here, should not be interpreted in such a way as to override them. *See United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 584-85 (1960) ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to

exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.")

This Court's precedent teaches that the question of whether an individual possesses a property interest in employment should not be treated lightly, or recklessly, because a constitutional right is potentially at stake. As this Court explained in *Perry*, "property interests subject to procedural due process protections are not limited by a few rigid, technical forms." *Id.* at 601, *citing Board of Regents v. Roth*, 408 U.S. 564 (1972). As this Court noted in *Roth*: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." 408 U.S. at 577.

B. The Seventh Circuit Also Failed To Recognize The Unique Properties Of The Firefighters' Collective Bargaining Agreement.

This Court has recognized that collective bargaining agreements are unique sources of property interests, because they are often not fairly interpreted without a full understanding of the common practices and understandings of the parties bound by them. As the Court in *Perry* explained, there is a "common law of a particular industry or of a particular plant that may supplement a collective-bargaining agreement." *Perry*, 408 U.S. at 602; *quoting United Steelworkers*, 363 U.S. at 579. In *United Steelworkers* this Court explained this principle by stating:

> There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of

> rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.

363 U.S. at 579 n.6, *quoting* Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-1499 (1959).

The Seventh Circuit's decision ignores not only the "just cause" language contained in the collective bargaining agreement – language that this Court has recognized creates property rights under the due process clause[5] –

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5. *Perry*, 408 U.S. at 601 ("A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient cause is shown."); *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1255 (10th Cir. 1998) ("The CBA gave Plaintiff a legitimate expectation of continued employment . . . unless the City found "cause shown."); *Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 914 (11th Cir. 1993) ("a public employee has a property interest in her job whenever she may only be dismissed for cause. . . . This interest is not dependent upon the presence of the specific words 'for cause,' as long as whatever provisions apply are meant to be analogous to allowing termination only 'for cause' . . . . The relevant inquiry is into 'the expectations of the parties involved. . . .'", citing *Glenn v. Newman*, 614 F.2d 467, 471-72 (5th Cir. 1980) (finding that the subject regulations may "fairly be read as creating a reasonable expectation of continue employment" absent noncompliance with one of the specified reasons for discharge).

but also fails to consider the relevant context within which the agreement was made and the unique characteristics of this agreement. At the time the CBA was signed, January 14, 1998, the City of Chicago did not have a mandatory retirement law in place. Indeed, the prior ordinance expired over four years previously, at the end of 1993. Additionally, the CBA's terms did not expressly reference or even contemplate an intent to allow the City to enforce mandatory retirement in the event the City desired to later reenact the law. The CBA's "just cause" and anti-discrimination provisions expressly state the opposite, barring arbitrary, age-based terminations, such as mandatory retirement, and the CBA's "Guarantee of Terms" provision precludes the City from unilaterally enacting subsequent laws that would impair those rights.

The lack of intent to allow mandatory retirement is further shown by contrasting the CBA here with the CBA entered into by the City with its police officers. Within the City's police officer CBA, the City expressly allowed for mandatory retirement, thereby negating any reasonable expectation in continued employment beyond the age of 63. (*See Minch*, 486 F.3d at 303 ("By contrast, the agreement with the City entered into with its police officers reserved to the City the authority to impose a mandatory retirement age.")) Contrary to the Seventh Circuit's decision, the omission of this important language in the Petitioners' CBA, which could have been bargained for and included since the City was a party to both agreements, shows that the parties to this contract did not intend to allow mandatory retirement.

Moreover, the Seventh Circuit's decision, concluding that the CBA implicitly allows mandatory retirement, also failed to consider the extreme hardship on Petitioners caused by its decision.[6] The court should have considered the harsh consequences that its rigid interpretation would inflict on petitioners and thereby, instead should have applied the "legitimate claim of entitlement" standard, as explained above.

Further showing that the Seventh Circuit considered unimportant the appropriate inquiry in this case – i.e., determining whether Petitioners had a legitimate expectation under the CBA of being free from mandatory

6. It is well-recognized that the loss of a job – even when it is not for discriminatory purposes – imposes an enormous burden on the individuals involved. "The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression." McDougal, Lasswell, and Chen. *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*. 29 U. Fla. L. Rev. 639, 641 (1976). This burden is only enhanced when the involuntary termination is driven by inappropriate discrimination. The burden borne by Petitioners (and by others who will follow them) – targeted for layoff on the basis of their age in order to create large scale job openings for political and/or affirmative action purposes – is a burden that has never been countenanced in cases challenging race-based layoffs for affirmative action purposes. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (Finding that "[w]hile hiring goals impose a diffuse burden, . . . layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive."). Nor should the burden imposed on Petitioners in this case be countenanced when a public employer discharges older firefighters in violation of a collective bargaining agreement so that it can achieve greater diversity in its ranks.

retirement[7] – is the court's concession that such terminations were not agreed to by the parties. *See Minch*, 486 F.3d at 304 ("Assuredly, the MRO imposed a new condition on the employment of firefighters to which the firefighters' union had not agreed."). Indeed, the union ultimately advanced the petitioners' grievances of their mandatory retirement, grievances that have yet to be resolved in the six years since they were taken up by the union.

Given the importance of the "common law" surrounding collective bargaining agreements, and the Constitutional interest at stake, the Seventh Circuit erred in dismissing this case at the pleading stage, and denying Petitioners the opportunity to plead additional facts in support of their property interest, if needed.[8] Indeed, the *Perry* Court found that respondents in that case "must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.'" *Id.* at 603. Petitioners here should have been afforded that same opportunity.

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7. *Hennigh*, 155 F.3d at 1255 ("The CBA gave Plaintiff a legitimate expectation of continued employment as a lieutenant unless the City found 'cause shown'.")

8. Petitioners believe the Seventh Circuit's decision will be reversed if that Court is required to apply the appropriate standard. However, Petitioners would like an opportunity to amend their Complaint in order to further support their due process claims. That opportunity has been requested, but has never been afforded to Petitioners.

II. The Seventh Circuit's Decision Is Directly At Odds With The Second Circuit's *Ciambriello* Ruling

The Seventh Circuit's decision directly conflicts with the Second Circuit's ruling in *Ciambriello v. County of Nassau*, 292 F.3d 307 (2d Cir. 2002). In *Ciambriello*, the Second Circuit addressed whether a government employee had a property interest in a position from which he was demoted. Ciambriello was demoted after an arbitrator issued an advisory award, which Ciambriello had no previous knowledge of or involvement in, that determined that Ciambriello's promotion violated the terms of the CBA because other county employees possessed more seniority. *Id.* at 312. The County argued, similar to the Seventh Circuit's decision here, that the CBA's "just cause" provision did not apply to non-disciplinary terminations. The Second Circuit rejected the County's narrow view, stating: "[W]e read the word 'discipline' more broadly to include any dismissal or demotion, regardless of the County's stated reason for the adverse employment action." *Id.* The Court further explained:

> In other words, we read § 10-5 as creating a substantive right not to be dismissed or demoted (or subjected to any of the other disciplinary actions identified in § 10-6) except in the event of incompetence or misconduct.

Id.

The Second Circuit's broad interpretation of the "just cause" provision rejects the Seventh Circuit's standard requiring CBA's to expressly prohibit adverse employment actions in order for them to be precluded from extinguishing a protected property right. The Second Circuit emphasized its disagreement with the Seventh Circuit's approach in criticizing the dissent's opinion that, like the Seventh Circuit, failed to recognize the improper result of its interpretation of the CBA:

> The dissent's interpretation would also leave the County free to demote – or even dismiss – any employee at any time for any reason, as long as it simply refrained from claiming that the basis for the demotion or dismissal was incompetence or misconduct. We believe it highly unlikely – indeed, inconceivable – that parties to a collective bargaining agreement would intend such a result.

Id. at 316 (*citing, Bowen v. United States Postal Service*, 459 U.S. 212, 220 (1983)("[A] collective bargaining agreement is much more than traditional common-law employment terminable at will.")

The Seventh Circuit standard, like that of the dissent in *Ciambriello*, gives the city carte blanche to box in the reach of the CBA's "just cause" provision by enacting involuntary termination ordinances that are not expressly prohibited under the CBA.

Petitioners believe that this split in the Circuits, on an issue directly relevant to the deprivation of a Constitutional right, also necessitates review by this Court.

CONCLUSION

The Seventh Circuit's ruling inappropriately invites municipalities around the country to abuse their legislative powers by allowing them to legislatively extinguish obligations they contractually made to their employees. Municipalities should not be given free rein to obliterate contractual commitments explicitly made to their employees. The plain language of the collective bargaining agreement in this case demonstrates that Petitioners had a protected property interest in continued employment that was legislatively abrogated without due process. Because the Seventh Circuit erroneously decided important questions of federal law, and because its decision is in conflict with this Court's decisions and those of other Circuits, this Court should grant this Petition for Writ of Certiorari and hear this case.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
MICHAEL R. KARNUTH
KRISLOV & ASSOCIATES, LTD.
20 North Wacker Drive
Chicago, Illinois 60606
(312) 606-0500

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 14, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-2702

JAMES D. MINCH and RICHARD A. GRAF,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 2586—**Samuel Der-Yeghiayan**, *Judge.*

ARGUED SEPTEMBER 14, 2006—DECIDED MAY 14, 2007

Before CUDAHY, MANION, and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* More than two years after the City of Chicago (the "City" or "Chicago") agreed to discipline and discharge its firefighters solely for cause, the City adopted a Mandatory Retirement Ordinance

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("MRO") compelling firefighters to retire at age 63. Two of the firefighters who were forced to retire under the MRO filed suit on behalf of themselves and others similarly situated, contending that mandatory retirement amounted to age discrimination prohibited by the Age Discrimination in Employment Act ("ADEA") as well as a deprivation of procedural due process. We concluded in *Minch v. City of Chicago*, 363 F.3d 615 (7th Cir.2004), that mandatory retirement of firefighters was not contrary to the ADEA. Today we conclude that mandatory retirement did not deprive the plaintiffs of their due process rights, because the collective bargaining agreement did not preclude the City from compelling its firefighters to retire at a particular age.

I.

On January 14, 1998, the City and its firefighters entered into a collective bargaining agreement effective for the four-year term beginning July 1, 1995 and ending on June 30, 1999. More than five years later, on July 9, 2003, the parties entered into a successive agreement governing the period from July 1, 1999 through June 30, 2007. In each instance, following the execution of the agreement, the Chicago City Council enacted the agreement into law. In all material respects, these two agreements were identical, and for ease of discussion we shall henceforth treat them as a single agreement (the "CBA" or the "agreement"). We set forth the relevant terms of the agreement below.

Appendix A

ARTICLE IX

SENIORITY RIGHTS

Section 9.1 Seniority

A. Seniority is defined as an employee's length of continuous service since his last date of hire. . . .

. . .

C. An employee's continuous service and the employment relationship shall be terminated when an employee:

1. Resigns or quits . . . [;]

2. Is discharged for just cause;

3. Retires or is retired;

4. Is absent for three (3) consecutive days (workdays) without notifying the Employer's authorized representative;

5. Is laid off and fails to report for work within ten (10) calendar days after mailing . . . a notification of recall . . . ;

6. Does not report to work after the termination of an authorized leave of absence, ...

ARTICLE XIII

NO DISCRIMINATION

Section 13.1 No Discrimination

. . . In accordance with applicable law, neither the Employer nor the Union shall discriminate against any employee covered by this Agreement because of race, creed, color, national origin, sex, age, religion or political affiliation.

. . .

ARTICLE XVI

GENERAL PROVISIONS

. . .

Section 16.2 Discipline and Discharge

. . .

B. The Employer agrees that employees shall be disciplined and discharged only for just cause. . . .

. . .

Appendix A

ARTICLE XIX

GUARANTEE OF TERMS

> The Employer agrees that this Agreement shall be immediately submitted to the City Council of the City of Chicago for ratification and concurrent adoption in ordinance form pursuant to the City's Home Rule authority. Such action by the Council shall commit the City of Chicago to enact no subsequent ordinances, executive orders or rules and regulations having the force and effect of law which would impair the binding effect of or make unenforceable the terms of this Agreement.

R. 112 Ex. A.

In the years preceding the parties' negotiation and adoption of the Agreement, federal age discrimination law had been in a state of flux with respect to age limits on public safety personnel. A more complete history is set forth in our opinion in *Kopec v. City of Elmhurst*, 193 F.3d 894, 896-98 (7th Cir. 1999). Briefly, when Congress extended the ADEA to state and local governments in 1974, no exception was made for individuals employed as police officers and firefighters; consequently, age limits were permitted only to the extent that employers could establish that age was a bona fide occupational qualification for the job. *See id.* at 896. For a time, doubts remained as to whether the Tenth

Amendment permitted Congress to subject state and local employees to federal anti-discrimination law. *See id.* at 896-97. Those doubts were put to rest by the Supreme Court's decision in *E.E.O.C. v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). In 1986, however, Congress amended the ADEA to exempt from the statutory ban on age discrimination any state or local age limits on public safety personnel which were in place as of March 3, 1983, the day after the *Wyoming* case was decided. *Id.* at 897. That exception expired by its terms on December 31, 1993, with the result that age limits for such personnel were once again presumptively invalid under the ADEA. *Id.* Then, in 1996, Congress reinstated the exemption retroactive to December 31, 1993 and with no expiration date. *Id.* at 898.

Seventy years ago, Chicago for the first time enacted an ordinance requiring those of its police and fire personnel holding civil service positions to retire at the age of 63. *See Malloy v. City of Chicago*, 369 Ill. 97, 15 N.E.2d 861, 863 (1938) (per curiam). After the ADEA was extended to state and local governments, and once the Supreme Court in *E.E.O.C. v. Wyoming* sustained that extension, Chicago raised the mandatory retirement age for its police officers and firefighters to 70, beyond which age the ADEA did not apply at that time. *See Minch I*, 363 F.3d at 618. After the 1986 exemption was adopted, Chicago in 1988 reinstated a mandatory retirement age of 63 for these personnel. *Id.* at 619. Following the expiration of the statutory exemption in 1993, the City again lifted the age cap in order to comply with the ADEA. *Id.* When the City and the firefighters'

union came to terms on the CBA in 1998, the City had not yet restored a mandatory retirement age for its police and fire personnel, although Congress had again authorized such age caps in 1996. Not until May 2000 did the City finally take advantage of the exemption to put the mandatory retirement age of 63 back into place. *Id.* at 620; *see* Chicago, Ill. Municipal Code § 2-152-410.

On December 31, 2000, the effective date of the reinstated age limit, the two named plaintiffs in this action, James D. Minch and Richard A. Graf, were required to retire from the Chicago Fire Department against their wishes. Minch was 64 at that time; Graf was 63.

Minch and Graf[1] then filed suit against the City on

1. Mandatorily-retired police officer Richard Cosentino joined this suit on behalf of himself and similarly-situated police officers. Separately, another police officer, Donald Drnek, filed an individual action challenging the age limit, and the instant suit was consolidated with Drnek's action. Although the police officers also challenged the mandatory retirement age on due process grounds, the collective bargaining agreement that the City entered into with its police officers contained a provision expressly recognizing that nothing in that agreement precluded the City from requiring police officers to retire on or after the age of 63. R. 7 Mem. Ex. B § 10.2. In light of that provision, the district court concluded at the outset of the litigation that the police officers had no protected property interest in employment beyond the age of 63 and dismissed their due process claims. *Drnek v. City of Chicago*, 192 F.Supp.2d 835, 848-49 (N.D.Ill.2002). Consequently, once this court ordered the (Cont'd)

behalf of a class of similarly situated firefighters contending, among other things, that enforcement of the City's MRO violated the ADEA and deprived them of their Fourteenth Amendment right to due process.[2] After the district court (Hon. Elaine E. Bucklo) denied the City's motion to dismiss these claims, *Drnek v. City of Chicago*, 192 F.Supp.2d 835 (N.D. Ill. 2002) ("*Drnek I*"), the court certified for interlocutory appeal the question of whether a state or local ordinance compelling the retirement of public safety personnel at a particular age which otherwise meets the criteria of the statutory exemption set forth in 29 U.S. § 623(j)(1) could be proven to constitute a subterfuge to evade the purposes of the ADEA and thus be actionable under section 623(j)(2), *Drnek v. City of Chicago*, 205 F.Supp.2d 894 (N.D. Ill. 2002) ("*Drnek II*"). We concluded in *Minch I* that the answer to that question was yes, but that the facts alleged in this case did not support a viable subterfuge claim. 363 F.3d at 628-30. When the City reinstated a

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(Cont'd)

dismissal of the age discrimination claims in *Minch I*, the police officers had no remaining claims. The police officers have not challenged the dismissal of their due process claims and are not parties to this appeal.

2. The plaintiffs asserted a companion claim for the alleged violation of their right to due process under the Illinois constitution. The court ultimately disposed of that claim on the same basis as the federal due process claim. R. 120; *Minch v. City of Chicago*, 2005 WL 78945 (N.D.Ill. Jan. 12, 2005). However, Minch and Graf do not challenge the dismissal of the state claim, and consequently we make no further mention of that claim here.

mandatory retirement age for its firefighters, we reasoned, it took action that was expressly authorized by the ADEA. Even if, as the plaintiffs alleged, City officials adopted the MRO based on outdated, inaccurate, and biased assumptions about the abilities of older workers, their motives were not sufficient to establish an actionable subterfuge, given the express Congressional authority they had been given to impose age limits on the employment of public safety personnel. *Id.* at 628-29. Rather, to establish subterfuge, the plaintiffs would have to show that the City enacted and enforced the MRO as a means of evading a separate, substantive provision of the ADEA. *See id.* at 630 (discussing hypothetical scenarios that might show subterfuge). This was a showing that the plaintiffs, on the facts alleged in this case, were unable to make. *Id.* Accordingly, we remanded the case to the district court with directions to dismiss Minch and Graf's ADEA claim and to conduct further proceedings consistent with this court's opinion. *Id.* at 631.

With the ADEA claim out of the case, what remained was the plaintiffs' Fourteenth Amendment due process claim. The due process claim is premised on the notion that the terms of the CBA, to which the City had contractually and legislatively bound itself, precluded the City from summarily forcing any firefighter to retire based solely on his or her age and gave the firefighters a protected property interest in continued employment absent good cause to discharge them. Section 16.2(B) of the CBA reflected the City's agreement "that employees shall be disciplined and discharged *only* for just cause."

(Emphasis ours.) In the plaintiffs' view, involuntary retirement amounts to a discharge, and as such was an action the City could *300 only take with just cause-age alone would not suffice. The plaintiffs also construe two additional provisions of the CBA to have precluded the City from adopting the MRO: Section 13. 1, which prohibited the City and the firefighters' union alike from discriminating against any employee based on age, "[i]n accordance with applicable law," and Article XIX, which provided that once the CBA was ratified and enacted into law, the City would enact no further legislation nor adopt any rule "which would impair the binding effect of or make unenforceable the terms of this Agreement."

While the case was pending on interlocutory appeal, it had been reassigned to a new district judge (Hon. Samuel Der-Yeghiayan). On review of this court's decision in *Minch I*, the court invited the City to re-file its motion to dismiss the due process claim. Judge Der-Yeghiayan believed that Judge Bucklo's rationale for refusing to dismiss that claim overlapped with her reasons for not dismissing the ADEA claim; given this court's decision that the ADEA claim was not viable, Judge Der-Yeghiayan believed that a fresh examination of the due process claim was in order. R. 146 at 3; *see also* R. 133 at 4. The City accepted the district court's invitation and renewed its motion to dismiss this claim.

After entertaining the parties' memoranda, the district court dismissed the due process claim. R. 120; *Minch v. City of Chicago*, 2005 WL 78945 (N.D. Ill. Jan.12, 2005). The court rejected the plaintiffs'

contention that CBA section 16.2(B)'s language requiring just cause for a discharge precluded involuntary retirement. "[S]uch a provision clearly was in regards to disciplinary action taken against employees and it is not applicable in the instant action because none of the Plaintiffs claim that they were forced into mandatory retirement as a part of a disciplinary measure for misconduct." *Id.* at *2. The court also understood section 9.1(C)(3) of the Agreement, which referred to an employee who "retires or is retired," as permitting involuntary retirement without just cause. *Id.* Finally, the court found that the MRO was not contrary to the CBA's anti-discrimination provision. Section 13.1 prohibited only unlawful age discrimination, the court reasoned, and this court in *Minch I* had held that imposing age limits on the employment of public safety personnel was not unlawful. *Id.* The district court subsequently denied the plaintiffs' motion to reconsider. R. 133.

II.

The district court disposed of the due process claim pursuant to Federal Rule of Civil Procedure 12(b)(6). A court may properly dismiss a claim pursuant to Rule 12(b)(6) only if the plaintiff could prove no set of facts consistent with the allegations of the complaint on which relief could be granted. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *see also, e.g.*, *Christensen v. County of Boone, Ill.*, 483 F.3d 454, 455 (7th Cir. 2007) (per curiam). Our review of the district court's decision to dismiss is, of course, de novo.

E.g., Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc., 474 F.3d 463, 471 (7th Cir. 2007). As always, we are obliged to accept the plaintiffs' factual allegations as true and construe those allegations in the light most favorable to the plaintiffs. *Id.*[3]

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3. We note that although the CBA was not attached to, and therefore not made part of, the plaintiffs' complaint, the plaintiffs do not contest the district court's authority (or our own) to consider the CBA in evaluating the viability of their due process claim. We have recognized that when a complaint refers to and rests on a contract or other document that is not attached to the complaint, a court might be within its rights to consider that document in ruling on a Rule 12(b)(6) motion to dismiss the complaint without converting the motion into one for summary judgment, so long as the authenticity of the document is unquestioned. *Tierney v. Vahle*, 304 F.3d 734, 738-39 (7th Cir. 2002). As it happens, the complaint in this case neither quoted from nor referred to the collective bargaining agreement; no mention of the CBA was made at all. Yet, there is no question that the plaintiffs' due process claim rests on the terms of the CBA. Indeed, both sides have cited and relied upon the CBA throughout this litigation. Moreover, as we have mentioned, the Chicago City Council did formally adopt the CBA and enact it into law, confirmation of which the City's lawyers tendered to the district court at Judge Bucklo's request. R. 30, 31. As Judge Bucklo recognized, courts may take judicial notice of local ordinances without resorting to summary judgment procedures. *Drnek I*, 192 F.Supp.2d at 847 (citing *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), and *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977)). In the absence of any objection to consideration of the CBA, we too shall consider the relevant terms of the agreement in evaluating whether Minch and Graf have a viable due process claim.

At the outset, we may put aside any concern as to whether the district court failed to pay adequate heed to the law of the case doctrine. Among other things, the law of the case doctrine embodies the notion that a court ought not to re-visit an earlier ruling in a case absent a compelling reason, such as manifest error or a change in the law, that warrants re-examination. *See, e.g., Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir.2006); *Starcon Int'l, Inc. v. N.L.R.B.*, 450 F.3d 276, 278 (7th Cir. 2006); *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997). This presumption against reopening matters already decided reflects interests in consistency, finality, and the conservation of judicial resources, among others. *Analytical Eng'g, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 454 (7th Cir. 2005). The presumption holds when a case is reassigned from one judge to another. *E.g., Brengettcy v. Horton*, 423 F.3d 674, 680 (7th Cir. 2005). "In situations where a different member of the same court re-examines a prior ruling, 'the law of the case doctrine . . . reflects the rightful expectation of litigants that a change of judges midway through a case will not mean going back to square one.' " *Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 691 (7th Cir.2005) (quoting *Best*, 107 F.3d at 546). When Judge Bucklo denied the City's original motion to dismiss the complaint, she concluded based on the language of the CBA that the plaintiffs had a viable due process claim. Judge Der-Yeghiayan subsequently invoked our decision in the interlocutory appeal as the justification for re-examining the due process claim. Yet, as the plaintiffs point out, our opinion in *Minch I* addressed the ADEA claim alone and had nothing to say

on the subject of the due process claim, which was beyond the scope of the interlocutory appeal. It is true that a discrete portion of Judge Bucklo's decision not to dismiss the due process claim had rested upon her assessment of the ADEA claim. Specifically, she had observed that to the extent enforcement of the City's MRO was inconsistent with the ADEA, the CBA's prohibition of age discrimination (section 13.1) would likewise prohibit the City from enforcing the MRO. *Drnek I*, 192 F.Supp.2d at 848. To that extent, our holding in *Minch I* undercut her rationale. But Judge Bucklo articulated other reasons for sustaining the viability of the due process claim that were entirely independent of the ADEA claim. *Id.* at 847-48. Our decision in *Minch I* did not implicate those additional grounds and thus did not necessitate a wholesale re-examination of the due process claim.

Nonetheless, Judge Der-Yeghiayan did re-assess the due process claim and find it wanting, precipitating this second appeal. The law of the case doctrine did not necessarily preclude him from doing so to the extent he was convinced the earlier ruling was obviously wrong. *See, e.g., Brengettcy*, 423 F.3d at 680; *Mendenhall*, 419 F.3d at 691. However, that was not argued to Judge Der-Yeghiayan and he did not articulate any such concern when he invited the City to re-file its motion to dismiss. To that extent, he acted inconsistently with the law of the case doctrine. Nonetheless, our task at this juncture is to examine the claim and determine for ourselves whether it is viable. The plaintiffs' reasonable expectations that the change in judge would not lead to a change in the law of the case may have been dashed,

but the law of the case doctrine does not constrain our review, *Santamarina*, 466 F.3d at 572, and it would not serve the ends of justice for us to mechanistically reinstate the original ruling below simply because the new judge failed to honor the law of the case doctrine, *see Native American Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873 (7th Cir.2005); *McMasters v. United States*, 260 F.3d 814, 818 (7th Cir. 2001); *Best*, 107 F.3d at 547. The appropriate course, particularly given our de novo review, is to decide on the merits whether the complaint states a due process claim on which relief can be granted. *See McMasters*, 260 F.3d at 818; *Best*, 107 F.3d at 546-47. Indeed, that is the thrust of the plaintiffs' opening brief, which criticizes Judge Der-Yeghiayan's decision to re-evaluate the due process claim but does not invoke the law of the case doctrine or invite us to reverse on that basis.[4] On to the merits.

An essential component of a procedural due process claim is a protected property or liberty interest. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 2803, 162 L.Ed.2d 658 (2005); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972). The plaintiffs contend that the CBA's identification of just cause as the sole basis for discipline or discharge gave them a property interest in continued employment of which the City deprived them when it compelled them to retire at age 63. *See id.* at 578, 92 S.Ct. at 2709 (terms

4. We invited supplemental briefing on the law of the case doctrine after the subject was broached by the court at oral argument.

of public worker's employment contract can give rise to protected property interest); *Roman v. United States Postal Serv.*, 821 F.2d 382, 386 (7th Cir. 1987) (collective bargaining agreement with public employee can give rise to protected property interest); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 624 (7th Cir. 1986) (same); *cf. Krieg v. Seybold*, 481 F.3d 512, 520 (7th Cir. 2007) (without clause providing that public employee could only be discharged for just cause, at-will employee had no protected property interest in continued employment). Whether indeed the plaintiffs had a protected interest in working beyond the age of 63 is a question that, as both sides agree, turns on the language of the CBA. *See id.* at 519-20; *see generally Chicago Painters & Decorators Pension, Health & Welfare, & Deferred Sav. Plan Trust Funds v. Karr Bro's, Inc.*, 755 F.2d 1285, 1290-91 (7th Cir. 1985) (assessment of what the parties to collective bargaining agreement meant begins with the language of the agreement) (quoting *U.A.W. v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983)). We must read the agreement as whole, I.B.E.W., *303 *Local 176 v. Balmoral Racing Club, Inc.*, 293 F.3d 402, 406 (7th Cir. 2002), construing its individual provisions not in isolation but with reference to the rest of the CBA, *Chicago Dist. Council of Carpenters Pension Fund v. K & I Constr., Inc.*, 270 F.3d 1060, 1069 (7th Cir. 2001).

The essential question before us is whether the terms of the CBA are properly understood to bar mandatory retirement. The CBA certainly lacks any provision that expressly authorizes the City to adopt a mandatory retirement age. (By contrast, the agreement

that the City entered into with its police officers reserved to the City the authority to impose a mandatory retirement age.) But the omission of such a term is not dispositive. The relevant inquiry is whether the provisions that the parties did include in their agreement preclude the City from imposing a mandatory retirement age on its firefighters. If so, they may have had a protected property interest in continued employment beyond the age of 63.

The CBA term on which the plaintiffs place most emphasis is section 16.2(B), which reflects the City's agreement to discipline and discharge an employee solely for just cause. The City concedes that this provision precludes it from taking disciplinary action against an employee, up to and including firing the employee, without just cause for that action. City's Brief at 26-27. In the plaintiffs' view, mandatory retirement is a form of discharge and as such is not permitted under section 16.2(B) absent just cause-which presumably an employee's age alone would not supply. ("Just cause" is not defined in the agreement, but the parties appear to agree that an employee's age alone would not constitute just cause to discharge him.)

But is involuntary retirement a discharge for purposes of section 16.2(B)? The answer is not obviously yes. Compelled retirement, like a discharge, severs the employment relationship between employer and employee. Nonetheless, there are intuitive distinctions between being fired and being forced to retire. Retirement is necessarily linked to the employee's age

and/or tenure with the employer; and whether voluntary or not, retirement often bestows certain benefits on the employee (e.g., a pension and/or continued receipt of insurance and other employee benefits) that he would not enjoy if simply fired. (There is the same intuitive distinction between quitting and retiring voluntarily). Being fired and being forced to retire indubitably have in common the fact that the employer unilaterally terminates the employment relationship. But only a broad understanding of the term "discharge" that brings within its reach any and all forms of involuntary termination would demand just cause even for an unwilling retirement.

It is in this regard that section 9.1(C) of the Agreement is relevant. For purposes of assessing an employee's seniority rights, section 9.1(C) identifies a variety of ways, both voluntary and involuntary, in which a firefighter's employment relationship with the City may terminate. Discharge for cause is among the identified forms of severance, § 9.1(C)(2), but is by no means the exclusive means of involuntary termination listed. For example, the agreement recognizes that the employment relationship terminates when an employee "retires or is retired." § 9.1(C)(3). Judge Der-Yeghiayan thought that the "is retired" language was an explicit reference to (and authorization of) involuntary retirement. It plausibly could be so understood, although this reads much into the use of the passive voice and, in the absence of any other contractual reference to mandatory retirement, may place more weight on the phrase than its two words ought to bear. But even if we

place the "retires or is retired" language in the category of voluntary terminations along with "[r]esigns or quits," *see* § 9.1(C)(1), there remain several other forms of involuntary termination that section 9.1(C) recognizes as distinct from a discharge for cause. These include: being absent from work for three consecutive days without notifying the employer's representative, being laid off and then failing to report back to work within ten days of being recalled, and failing to report back to work on the conclusion of an authorized leave of absence. § 9.1(C)(4)-(6). This makes clear that the term "discharge" in section 16.2(B) does not include all forms of involuntary termination, such that just cause invariably is required whenever the City terminates a firefighter's employment unilaterally. We note that a neutral arbitrator came to the same conclusion in resolving a dispute between a terminated firefighter and the City. R. 114 Ex. A (*Chicago Firefighters' Union, Local No. 2 v. City of Chicago*, Griev. No. 990133, Decision & Award at 22-23 (Mar. 7, 2000) (Peter R. Meyers, Arb.)).

The plaintiffs retort that section 9.1(C) is a seniority provision that in substance deals only with the question of *when* the employment relationship terminates rather than *how* (or, put another way, for what reason) it may be terminated by the City. We have not overlooked the context of the provision. But even having in mind that its focus is the termination of employment for seniority purposes, this section nonetheless is relevant for the light it shines on the scope of the term "discharge." In recognizing multiple forms of involuntary termination

apart from a discharge, this provision puts to rest the notion that any termination against the employee's wishes is necessarily a "discharge" for which the City must have just cause. Given the distinctions between retirement and discharge, we do not read section 16.2(B) to condition involuntary retirement on a showing of just cause.

The plaintiffs alternatively rely on the CBA's Guarantee of Terms as a bar to the City's enactment of the MRO. Article XIX provides that once the Chicago City Council has ratified the CBA and enacted it into local law, the City shall "enact no subsequent ordinances, executive orders or rules and regulations having the force and effect of law which would impair the binding effect of or make unenforceable the terms of this Agreement." We assume for the sake of argument that Article XIX would preclude the City from adopting a mandatory retirement age if, as the plaintiffs have argued, Section 16.2(B) conditioned all forms of involuntary termination, including involuntary retirement, on the existence of just cause. So understood, the CBA would give a firefighter the right to continue working regardless of his age, so long as he could perform the duties of his job and gave his employer no cause to discharge him. And by forcing employees to retire at age 63, the subsequent adoption of the MRO could be thought to impair the binding effect of section 16.2(B) and/or to render it unenforceable.

But because section 16.2(B) does not foreclose the City from imposing a mandatory retirement age, Article

XIX poses no independent obstacle to the MRO. Assuredly, the MRO imposed a new condition on the employment of firefighters to which the firefighters' union had not agreed. Unilateral though it was, however, the enactment and enforcement of the MRO neither impaired the binding effect of the CBA nor rendered unenforceable its terms, none of which precluded the adoption of a mandatory retirement age.

Nor do we construe Section 13.1's non-discrimination provision to bar the MRO. This provision of the CBA forbids age discrimination "[i]n accordance with applicable law," which we understand to define the scope of prohibited discrimination as discrimination which is prohibited by federal, state, or local anti-discrimination law. The Chicago Human Rights Ordinance prohibits age discrimination in employment without an explicit exception, akin to that in the ADEA, for age limits on public safety personnel. Chicago, Ill. Municipal Code § 2-160-030. The plaintiffs thus contend that enforcement of the MRO amounts to a violation of the Human Rights Ordinance.

Yet the same legislative body that enacted the Human Rights Ordinance also enacted the MRO, and in so doing explicitly mandated the age-based retirement of firefighters. The Chicago Commission on Human Relations, in response to discrimination complaints filed by Minch and Graf, concluded that the MRO was reasonably understood as an implicit exception to the Human Rights Ordinance's ban on age discrimination. *In re Minch, et al.*, Case Nos. 01-E-21/44/48, 2001 WL

1042282 (Chi. Com. Hum. Rel. Aug. 24, 2001). Consequently, the ordinance, as construed by the Commission, does not forbid enforcement of the MRO. The plaintiffs have given us no reason to overlook or reject the Commission's construction of local anti-discrimination law.

III.

The collective bargaining agreement between the City and its firefighters did not preclude the City from subsequently adopting a mandatory retirement age. Because the CBA did not give the plaintiffs a protected property interest in continued employment regardless of their age, the plaintiffs cannot show that they were deprived of procedural due process when the City adopted the MRO and enforced it by compelling their retirement at age 63. Accordingly, the district court properly dismissed the due process claim. We need not reach any of the other arguments the parties have raised.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 10, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 01 C 2586

JAMES D. MINCH, RICHARD A. GRAF and RICHARD CONSENTINO, individually, and on behalf of a class of all individuals who are similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Plaintiffs' motion for reconsideration brought pursuant to Federal Rule of Civil Procedure 59(e). For the reasons stated below, we deny Plaintiffs' motion for reconsideration.

Appendix B

BACKGROUND

Plaintiffs in this action initially consisted of former City of Chicago ("City") firefighters that were subjected to mandatory retirement in December of 2000 in accordance with a Mandatory Retirement Ordinance ("MRO") enacted by the City in May of 2000. Plaintiffs filed a three count complaint alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, (Count I), a federal due process claim (Count II), and a state due process claim (Count III). This action was ultimately consolidated with a similar action brought by City police officers and firefighters and the prior judge in this action certified a question for interlocutory review in regards to the ADEA claims. The Seventh Circuit remanded the action back to this court and ordered that the court dismiss the ADEA claims. The City subsequently moved to dismiss the remaining due process claims in this action against the Firefighter Plaintiffs ("Plaintiffs") and on January 3, 2005, we granted the City's motion to dismiss Plaintiffs' due process claims. Plaintiffs have brought the instant motion seeking a reconsideration of the court's January 3, 2005 ruling.

LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) ("Rule 59(e)") permits parties to file, within ten days of the entry of a judgment, a motion to alter or amend the judgment. Fed. R. Civ. P. 59(e). Rule 59(e) motions do not give a party the opportunity to rehash old arguments or to

present new arguments or evidence "that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) (citing *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995)). Rather, for a Rule 59(e) motion, the movant "must clearly establish either a manifest error of law or fact or must present newly discovered evidence" in order to be successful. *LB Credit Corp.*, 49 F.3d at 1267 (quoting *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)). The decision of whether to grant or deny a motion brought pursuant to Rule 59(e) "is entrusted to the sound judgment of the district court. . . ." *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996).

DISCUSSION

Plaintiffs' motion for reconsideration is improper for a variety of reasons. First of all, many of the arguments presented by Plaintiffs are completely new arguments that were not previously presented in opposition to Defendants' motion to dismiss. Although Plaintiffs' new arguments do not have any more merit than their previous ones, Plaintiffs are improperly utilizing their motion for reconsideration in an attempt to gain a second review of Defendants' motion to dismiss. As indicated above, it is improper to include arguments in a motion for reconsideration that could have been presented previously. A motion for reconsideration is also reserved for when a court has committed a manifest error of law. A motion for reconsideration is not available to parties

so that they can ask the opposing party and the court to needlessly waste resources by litigating every motion twice. In the instant motion for reconsideration, Plaintiffs do little more than argue in hindsight based upon the court's prior ruling, attempting to distinguish the court's prior ruling by posing a new set of arguments to see if the court will change its mind the second time around. Plaintiffs do not point to any manifest error or any basic misunderstanding of the facts at issue in this action. Instead, Plaintiffs argue that they disagree with the court's prior ruling and ask that the court alter its decision. We could deny Plaintiffs' motion for reconsideration on these bases alone. However, as Plaintiffs' new arguments clearly have no more merit than the first set of arguments, we will address them in an expeditious manner below.

Plaintiffs first argue that the court erred in finding that Plaintiffs lacked a protectable property interest in continued employment. Plaintiffs again argue that they have a right to continued employment based upon Section 16.2 of the CBA which indicates that Plaintiffs would only be fired "for just cause." (CBA Sec. 16.2(B)). As we explained in our prior ruling, Section 16.2 applies to disciplinary actions and is not applicable in the instant action because none of the Plaintiffs contend that they were fired for disciplinary reasons. Plaintiffs' first argument in regards to the court's ruling is that the prior judge in the action had ruled differently on the same issue. However, the prior judge clearly tied her determination regarding the Plaintiffs' due process claims to her ruling on the ADEA claims stating the

following: "I have already concluded that the plaintiffs state a claim for a violation of the ADEA, so that they have also stated a claim for a violation of the City's contractual obligation to abide by the law." (3/25/02 Mem. 30). Since that ruling, the Seventh Circuit ordered that the ADEA claims in this case be dismissed and thus, we subsequently ruled upon Defendants' latest motion to dismiss under different circumstances than the prior judge. Also, the ruling on Defendants' initial motion to dismiss in this regard is clearly contrary to the law as Plaintiffs have failed to allege a sufficient property interest to support the due process claims from the outset of this action.

Plaintiffs also argue that Section 16.2 of the CBA does not solely apply to disciplinary actions. We disagree. Plaintiffs have presented no new argument that draws into question the court's prior reasoning in this regard. Plaintiffs point out that Section 16.2 states that it deals with employees that are "disciplined and discharged." Plaintiffs highlight the word "and" in their brief and argue that the word "and" indicates that Section 16.2 applies to more than simply disciplinary actions. However, we are not convinced that the word "and" in the above phrase supports Plaintiffs' position or that it justifies the strained inference that Plaintiffs seek to draw from the word in Section 16.2. Section 16.2 provides that the City "agrees that employees shall be disciplined and discharged only for cause." CBA Sec. 16.2(B)). Section 16.2 is clearly intended to address disciplinary actions only. Section 9.1(C)(3) of the CBA, which provides for the termination of employment when an employee

"[r]etires or is retired," is applicable in the instant action and there is no "just cause" provision in Section 9.1 and in Section 16.2. (CBA Sec. 9.1).

Plaintiffs again argue that Section 9.1(C)(3) does not apply to Plaintiffs' due process rights and ask that the court "reject the City's request to judicially rewrite the 'is retired' language in" Section 9.1 of the CBA. (Mot. 5). First of all, this argument illustrates the impropriety of the instant motion for reconsideration because the court has already agreed with Defendants' position and has ruled in Defendants' favor. Plaintiffs' argument that the court should reject the City's argument is thus untimely. Regardless, Plaintiffs' instant argument on this issue is without merit. It is the court, rather than Plaintiffs, that applied the plain and explicit language of the CBA in a logical manner in making its decision and it is Plaintiffs that attempt to twist the text of Section 9.1 to present their own interpretation in their favor. Plaintiffs' arguments are based upon unsupported inferences that are contrary to the explicit language of the CBA.

Plaintiffs next argue that the fact that the Seventh Circuit dismissed Plaintiffs' ADEA claims does not mean that Defendants did not discriminate against Plaintiffs because of their age. However, Plaintiffs' argument flies in the face of the Seventh Circuit's ruling in this action. Despite Plaintiffs' protests to the contrary, the Seventh Circuit clearly found that the MRO did not constitute age discrimination. Thus, not only are Plaintiffs improperly utilizing the motion for reconsideration to

bombard this court with arguments on the motion to dismiss, Plaintiffs are also continuing to challenge the Seventh Circuit's prior ruling in this action.

Plaintiffs next complain that the court "appears to have relied upon" some arguments that Plaintiffs contend were first presented by Defendants in their reply brief. (Mot. 10). First of all, Plaintiffs are incorrect when they presume what the court relied upon in forming its decision. The court did not rely on the arguments that Plaintiffs now complain about in Defendants' reply brief. Secondly, the arguments contained in Defendants' reply brief were clearly not new arguments, but rather were in direct response to the arguments made by Plaintiffs in their answer to the motion to dismiss. Thus, there was nothing improper in regards to the arguments in Defendants' reply brief. Third, Plaintiffs have attempted to manipulate the motion for reconsideration process in order to obtain a second review of Defendants' motion to dismiss. Plaintiffs have thus presented all of their new arguments subsequent to the filing of Defendants' reply brief and we note that the arguments included in Plaintiffs' motion for reconsideration would not have caused the court's prior ruling to be altered.

Plaintiffs' final argument is to simply refer to the motion to dismiss standard and ask the court to find that there are potential facts in this action that might form the basis of a claim. We abided by the appropriate legal standard when ruling on Defendants' motion to dismiss and specifically acknowledged in our prior ruling that the allegations of a complaint should not be dismissed

for a failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Under such a standard, we found a dismissal appropriate and Plaintiffs have pointed to no new facts that would alter our prior ruling. Although the federal notice pleading standard is liberal in this regard, Plaintiffs are still required to allege the operative facts in their complaint. *Kyle v. Morton High School*, 144 F.3d 448, 445-55 (7th Cir. 1998). This court cannot, as Plaintiffs propose, allow an action to proceed past the pleadings stage based solely upon unreasonable inferences extracted from the pleadings and unfounded speculation. Were the pleading requirements such that a court could not dismiss an action unless there were no possible claims when subjected to the unbounded imagination of the parties and the court, no action would ever be dismissed. Plaintiffs have not met the pleading requirements under the federal notice pleading standard and we properly dismissed their due process claims.

We also note that, in a footnote of Plaintiffs' motion for reconsideration, Plaintiffs ask leave to file an amended complaint to correct the obvious deficiencies in their complaint. Such a request is improper since this case has been terminated. This action has gone on for nearly four years, including an appeal to the Seventh Circuit and a ruling by that court instructing this court to dismiss certain claims from the complaint. Plaintiffs are not entitled to rewrite their complaint and begin

anew at this juncture after the case has been terminated. Therefore, we deny Plaintiffs' motion for reconsideration and we deny Plaintiffs' request to amend their complaint as moot.

CONCLUSION

Based on the foregoing analysis, we deny Plaintiffs' motion for reconsideration. All other pending motions are denied as moot.

s/ Samuel Der-Yeghiayan
Samuel Der-Yeghiayan
United States District Court Judge

Dated: May 10, 2005

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JANUARY 3, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 01 C 2586

JAMES D. MINCH, RICHARD A. GRAF and RICHARD CONSENTINO, individually, and on behalf of a class of all individuals who are similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendant City of Chicago's ("City") motion to dismiss. For the reasons stated below, we grant the motion to dismiss.

Appendix C

BACKGROUND

Plaintiffs are former Chicago firefighters that were subjected to mandatory retirement in December of 2000 in accordance with a Mandatory Retirement Ordinance ("MRO") enacted by the City in May of 2000. Plaintiffs filed a three count complaint alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, (Count I), a federal due process claim (Count II), and a state due process claim (Count III). This action was consolidated with a similar action brought by City police officers and firefighters and the prior judge in this action certified a question for interlocutory review in regards to Plaintiffs' ADEA claims. The Seventh Circuit remanded the action back to this court and ordered that the court dismiss the ADEA claims. The City has now moved to dismiss the remaining due process claims in this action.

LEGAL STANDARD

In ruling on a motion to dismiss, the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Thompson v. Illinois Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002); *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). The allegations of a complaint should not be dismissed for a failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him

to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege the "operative facts" upon which each claim is based. *Kyle v. Morton High School*, 144 F.3d 448, 445-55 (7th Cir. 1998); *Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir. 1992). Under current notice pleading standard in federal courts a plaintiff "need to plead facts that, if true, establish each element of a 'cause of action.'" *See Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (stating that a "[a]t this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint" and that "[m]atching facts against legal elements comes later."). The plaintiff need not allege all of the facts involved in the claim and can plead conclusions. *Higgs v. Carter*, 286 F.3d 437, 439 (7th Cir. 2002); *Kyle*, 144 F.3d at 455. However, any conclusions pled must "provide the defendant with at least minimal notice of the claim." *Id.*, and the plaintiff cannot satisfy federal pleading requirements merely "by attaching bare legal conclusions to narrated facts which fail to outline the bases of [his] claim." *Perkins*, 939 F.2d at 466-67.

DISCUSSION

The City argues that the remaining due process claims must be dismissed because Plaintiffs have not shown that they have been deprived of a property interest. The limitations of procedural due process "allow[ ] the government to deprive a citizen of 'life, liberty, or property' only in accordance with certain

procedural protections. *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 768 (7th Cir. 2004). In order to succeed on a procedural due process claim a plaintiff must establish that there is: "(1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process." *Hudson v. City of Chicago*, 374 F.3d 554, 559 (7th Cir. 2004) (quoting *Buttitta v. City of Chicago*, 9 F.3d 1198, 1201 (7th Cir. 1993)).

The City argues that any property interest that Plaintiffs had in continuing employment as a firefighter terminated when Plaintiffs turned sixty three. In regards to governmental employment "[t]he protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected 'property' interest." *Gilbert v. Homar*, 520 U.S. 924, 928, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997). Plaintiffs argue that they base their property right in continued employment on the section of the Collective Bargaining Agreement ("CBA") that provides that the City "agrees that employees shall be disciplined and discharged only for cause." (CBA Sec. 16.2(B)) (Ans.6). However, such a provision clearly was in regards to disciplinary actions taken against employees and it is not applicable in the instant action because none of the Plaintiffs claim that they were forced into mandatory retirement as part of a disciplinary measure for misconduct. Also, Section 9.1(C)(3) of the CBA enables the City to terminate employment when the employee "[r]etires or is retired." (CBA Sec. 9.1) In Section 9.1(C)(3) there is no "just

cause" provision as there is in Section 16.2(B) of the CBA which addresses disciplinary matters.

Plaintiffs also argue that their property interest can be based on the anti-discrimination section of the CBA which provides that the City "shall not discriminate against any employee covered by this agreement because of race, creed, color, national origin, sex, age, religion, or political affiliation." (CBA Sec. 13.1). However, the Seventh Circuit, in ordering the dismissal of the ADEA claims, found that the MRO did not constitute age discrimination. Clearly the provision in the CBA referred to unlawful age discrimination for which the proper claim would be an ADEA claim. The CBA did not provide that the City could not set a mandatory retirement age or set such reasonable measures in regards to retirement. Therefore, we grant the City's motion to dismiss.

CONCLUSION

Based on the foregoing analysis, we grant the City's motion to dismiss.

s/ Samuel Der-Yeghiayan
Samuel Der-Yeghiayan
United States District Court Judge

Dated: January 3, 2005

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 26, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Nos. 01 C 0840, 01 C 2586.

March 26, 2002.

Donald DRNEK,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

James D. Minch, Richard A. Graf, and Richard Cosentino, individually, and on behalf of a class of all individuals who are similarly situated,

Plaintiffs,

v.

City Of Chicago, an Illinois Municipal Corporation,

Defendant.

Appendix D

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

The plaintiffs in these cases are Chicago Police and Fire Department officers who were involuntarily retired under the City of Chicago's mandatory retirement ordinance, Chicago Municipal Code § 2-152-140. Donald Drnek sued the City of Chicago ("City") for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), and for due process violations under federal and Illinois law. James Minch, Richard Graf and Richard Cosentino filed a substantially identical claim on behalf of themselves and others similarly situated.[1] The City moves to dismiss both complaints. I deny the motions as to the ADEA claims in Count I, and grant them in part and deny them in part as to the due process claims in Counts II and III.

I.

The plaintiffs, all former Chicago police officers and firefighters, were terminated on December 31, 2000, pursuant to the City's mandatory retirement ordinance (the "Ordinance"), which establishes sixty-three years as the maximum age for sworn members of the Police Department and for members of the uniformed service of the Fire Department. Chicago Municipal Code

1. The putative class action was originally filed before Judge Norgle, but was reassigned to me based on relatedness. *See* Minute Order of 5/18/01.

("CMC") § 2-152-140.[2] The City did not give the plaintiffs an opportunity to take physical fitness tests to demonstrate that they could still meet the fitness requirements of the job.

Ordinarily, under Fed.R.Civ.P. 23, class certification should be addressed before any consideration of the merits, but the ADEA class action is not subject to Rule 23, *see* 29 U.S.C. § 626(b) (incorporating opt-in procedures under 29 U.S.C. § 216); *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir.1998) (holding that ADEA class actions are "opt-in" actions under § 216(b), not "opt-out" actions subject to Rule 23), so I may address the merits of these claims without resolving class certification. *See Vanskike v. Peters*, 974 F.2d 806, 812-13 (7th Cir.1992) (addressing merits of § 216(b) action before resolving class issues); *see also McCann v. City of Chicago*, No. 89 C 2879, 1990 WL 70415, at *3 (N.D.Ill. May 3, 1990) (Grady, J.). On the due process claims, the plaintiffs have not moved for certification under Rule 23, and the City moved to dismiss on the merits without addressing the propriety of certification, so it has waived the Rule 23(c) protection of certification before a decision on the merits. *See Williams v. Lane*, 129 F.R.D. 636, 647 (N.D.Ill.1990) (Shadur, J.) (Noting that certification prior to the merits protects against "one-way intervention" by class members, and holding that a defendant

2. I may take judicial notice of municipal ordinances on a motion to dismiss without converting the motion to one for summary judgment. *See Menominee Indian Tribe of Wisc. v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998); *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.1977).

implicitly waived objection on this basis by seeking a favorable decision on the merits). To the extent that the City objects to the plaintiffs' standing to raise arguments on behalf of other class members, the class issues are not ripe. I therefore address only the claims of the individual plaintiffs.

On a motion to dismiss, I take all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiffs. *Szumny v. American Gen. Fin., Inc.*, 246 F.3d 1065, 1067 (7th Cir.2001). I will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Id.*

II. Age Discrimination

The ADEA makes unlawful the discharge of an individual because of his age, 29 U.S.C. § 623(a)(1), but it contains an exemption for firefighters and law enforcement officers, *id.* at § 623(j). The exemption applies if certain age requirements are met and if the employment action is taken pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of the ADEA. To avoid dismissal, therefore, the plaintiffs need only demonstrate that they are entitled to proceed on one of the two theories: the propriety of the age requirements or subterfuge.

The ADEA was enacted in 1967, and at that time it did not apply to employees of state or local government.

Kopec v. City of Elmhurst, 193 F.3d 894, 896 (7th Cir.1999). On March 2, 1983, the Supreme Court held that the ADEA could be applied to state and local government, *see EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), leaving many state and local laws establishing maximum hiring and retirement ages for firefighters and police officers open to challenge. *See Kopec*, 193 F.3d at 897. To preserve mandatory retirement ordinances, states and municipalities had to demonstrate that they fit into the narrow exception for bona fide occupational qualifications ("BFOQ"). *Id.* In 1986, however, Congress amended § 623 to allow states to enforce any age restrictions that were in place as of March 3, 1983 (the day after the Supreme Court decided *EEOC v. Wyoming*). *Id.* The amendment had a sunset provision, providing for expiration on December 31, 1993. *Id.* The amendment expired, and Congress took no further action until 1996, when it retroactively reinstated the 1986 amendment with some modifications.

The 1996 amendments[3] say that a mandatory

3. The complete text of § 623(j) follows:

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(Cont'd)

retirement provision does not violate the ADEA if "the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section." 29 U.S.C. § 623(j)(1). In addition, the

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(Cont'd)

> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—
>
> (A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or
>
> (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or
>
> (ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—
>
> (I) the age of retirement in effect on the date of such discharge under such law; and
>
> (II) age 55; and
>
> (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

employee must have reached either (A) the retirement age in effect on March 3, 1983, or, (B) if the law was enacted after September 30, 1996, the higher of the age provided in the law and age fifty-five. *Id.* Finally, the employment action must be taken "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of [the ADEA]." *Id.* at (j)(2).

"Section 3(d)(2)" is not a part of the United States Code, but according to the Historical and Statutory Notes to § 623, section 3(d)(2) "probably means" Pub.L. 104-208, Title I, § 101(a), which sets forth a "Study and Guidelines for Performance Test" to be conducted by the Secretary of Health and Human Services ("HHS"). Under Pub.L. 104-208, HHS was to develop and issue, by September 30, 2000, "advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competence of law enforcement officers and firefighters to perform the requirements of the [ir] jobs." *Id.* at (c). After issuing the advisory guidelines, HHS was directed to issue regulations identifying appropriate nondiscriminatory job performance tests, *id.* at (d)(1), and "[e]ffective on the date of the regulations described in [subparagraph (d)(1)], any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in [subparagraph (d)(1)], in order to continue employment." *Id.* at (d)(2). HHS never issued the advisory guidelines or regulations called for by § 3(c) and (d).

Appendix D

The City had a mandatory retirement ordinance as early as 1939, which provided for retirement of "policemen and firemen in the classified civil service." Pl's Ex. B. This version was in effect until 1983, when the Supreme Court decided that the ADEA applied to State and local governments. *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). In response to the Supreme Court's decision, the City amended its mandatory retirement ordinance, raising the retirement age to 70 and applying to the "career service," which had replaced the classified civil service in 1976. Pl's Ex. C. This version was in effect until 1988, when the City again amended the ordinance in response to the first "public safety exemption" passed by Congress in 1986. The 1988 version provided that "[e]very sworn member of the police department and every member of the uniformed service of the fire department who has attained the age of 63 years prior to December 31, 1993, shall forthwith and immediately be retired from service." Pl's Ex. D. The ordinance thus mirrored the sunset provision of the 1986 public safety exemption. After December 31, 1993, there was no ordinance that provided for mandatory retirement of police and firefighters until, on May 17, 2000, the City enacted the Ordinance that is the subject of this suit, which sets sixty-three as the maximum age for employment of sworn members of the Police Department and for any member of the uniformed service of the Fire Department. CMC § 2-152-410(a), (b).

Appendix D

A. Section 623(j)(1): Proper Age Requirements

1. Fitness Tests

The plaintiffs claim that the City violated the ADEA because it discharged them under the Ordinance without affording them an opportunity to prove their fitness for duty by taking the tests described in § 3(d)(2). Although no such tests were ever prescribed by HHS, the plaintiffs claim that the reference to § 3(d)(2) in § 623(j)(1) made performance testing a "first-tier prerequisite to mandatory retirement," and that "the spirit and the letter of Section 623(j)" require an opportunity to prove fitness before mandatory retirement. The plaintiffs cite *Gately v. Massachusetts*, No. CIV. A. 92-13018-MA, 1998 WL 518179 (D.Mass. June 8, 1998), in support of their argument that the City, like the defendants in *Gately*, ought to have retained an expert to develop tests in order to comply with the statute. But *Gately* was brought under § 623(f)(1) (the BFOQ provision), before the 1996 amendments, so the discussion of § 623(j)(1) as a Congressional endorsement of fitness tests is dictum. I cannot read *Gately*, a case arising under § 623(f)(1), to *require* employers to incur the cost of developing fitness tests to comply with § 623(j), particularly where Congress evidenced an intent in § 3(d)(2) to place that burden on HHS.

Before the expiration of the time for HHS to issue testing regulations, a court in this district examined a mandatory retirement ordinance that provided for the discharge of police officers at age sixty-five "unless

'otherwise demonstrating physical and mental fitness pursuant to regulations to be promulgated by the United States Secretary of Health and Human Services.'" *See Glennon v. Village of S. Barrington*, No. 00 CV1264, 2000 WL 1230494, at *4 (N.D.Ill. Aug. 25, 2000) (Leinenweber, J.). The municipality had not afforded the plaintiff an opportunity to demonstrate his fitness, but the court held that the plaintiff failed to state a claim for a violation of the ADEA on that basis. *Id.* The plaintiff argued that the exemption was void because § (3)(d)(1) states that employers "shall" use performance tests developed by HHS, but "Congress ... promulgated § 623 without specific fitness tests to go immediately into effect." *Id.* at *4. The court assumed that § 623 was valid because the Seventh Circuit had analyzed several cases under that section and had not questioned its validity. *Id.* *Glennon* was decided prior to September 30, 2000, so it does not address the situation of what happens when HHS fails altogether to fulfill its mandate under § 3(d)(2). As far as I can tell, this is an issue of first impression.

Section 623(j)(1), as amended, contains no sunset provision, but it leaves a gap by requiring employers to comply with regulations that have not been promulgated. As a "general rule[,] exceptions to remedial statutes are to be narrowly construed." *EEOC v. Chicago Club*, 86 F.3d 1423, 1433 (7th Cir.1996). The plain language of the statute, the starting point in all statutory interpretation, *United States v. Wagner*, 29 F.3d 264, 266 (7th Cir.1994), merely mandates compliance with § 3(d)(2), so it offers no guidance in discerning Congress' intent. Section 3(d)(2), however, requires an employer to offer a fitness

test developed by HHS "[e]ffective on the date of issuance of the [HHS] regulation," and requires an employer to offer tests only after HHS develops them and issues regulations. Section 3(d)(1) says that an employer "shall" use the performance tests developed and issued by the Secretary. One interpretation of § 623, the one rejected in *Glennon*, is that the exemption was void *ab initio* because it required compliance with non-existent regulations. Put another way, § 623(j) says that an employer may discriminate based on age only if it complies with regulations promulgated by HHS, and if no regulations were promulgated, the employer could not comply and therefore could not meet the requirements of the public safety exemption. An alternative construction is that the fitness tests themselves were an exception to the exemption, with which the City had to comply only once regulations were promulgated. That is, because no regulations were ever promulgated, the effective date in § 3(d)(2) from which employers had to offer fitness tests never occurred, so the City was not in violation of § 3(d)(2) when it failed to offer fitness tests. Because the plain language of § 623 is ambiguous, I turn to the legislative history of the exemption to discern Congress' intent. *See Central States, S.E. and S. W. Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1323 (7th Cir. 1995).

The so-called "public safety exemption," H.R. 849,[4]

4. An identical version had twice passed in the House but failed in the Senate. The House Report on one of the earlier bills stated that the purpose of the amendment was to permit, but

(Cont'd)

was introduced in the House of Representatives on February 7, 1995. 141 Cong. Rec. 3979. Representative Fawell, the sponsor, stated that, although age

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not require, the use of mandatory retirement ages for State and local firefighters and police officers. H.R. Rep. 103-314, 1993 WL 444307 (1993). At the conclusion of its explanation, the report stated that:

> the Committee is opposed to the expiration of the public safety exception to the ADEA and effectively mandating that States and localities adopt physical and mental fitness tests as an alternative to age-based hiring and retirement policies. States and localities may choose to develop such tests and H.R. 2272 allows them to do this. However, given the paucity of knowledge about appropriate performance standards and the great uncertainty about the effectiveness and legality of one or another performance test, Congress should not force every public safety agency to use such tests.
>
> In making the public safety exception to the ADEA permanent, the Committee does not intend to forever close the door on this issue but rather to ensure that when Congress does re-examine this issue, it does so because there [is] . . . significant evidence of reasonable, effective alternatives to age-based policies that do not have an adverse impact on women and minorities.

Id. Thus, the Committee intended that the public safety exemption should apply, without a sunset provision, until a more satisfactory testing alternative became available.

requirements as job qualifications are rarely justified, the "public safety arena" presents an exception, and he discussed testimony showing that existing physical tests were inadequate to ensure a fit and qualified workforce. *Id.* at 3982. During the floor debates the following month, Representative Fawell stated that the bill directed a federal agency to develop advisory guidelines for fitness tests, but he said "[u]ntil the point that adequate tests are in place however, I feel that the public safety exemption to the ADEA is necessary and that H.R. 849 should be quickly enacted." 141 Cong. Rec. 9491. Representative Owens supported the bill, and said that it "would permanently exempt state and local public safety agencies from the Age Discrimination in Employment Act in order to permit them to consider age in their hiring and retirement policies." *Id.* He also noted that fitness tests in existence at that time tended to discriminate against women and minorities, and that they were not an effective substitute for age limits. *Id.* at 9492. Representative Weldon said that "[f]itness tests are not a valid alternative to age limits," apparently because of the shortcomings of existing tests, and that "[i]n the absence of a valid fitness test, age limits ensure our public safety teams are in peak condition." *Id.* H.R. 849 passed the House on March 28, 1995. *Id.*

An identical bill, S. 553, was introduced in the Senate on March 14, 1995, by Senator Moseley-Braun. 141 Cong. Rec. 7765. Senator Moseley-Braun emphasized that federal public safety officers were subject to mandatory retirement based on age, and that the amendment would extend a similar exemption to State and local

governments. *Id.* She recounted the history of the exemption and noted that the EEOC had failed to fulfill its mandate under the 1986 amendment to develop advisory guidelines and fitness tests. She noted that medical evidence demonstrated that age directly affects an individual's ability to perform the duties of public safety officers. *Id.* at 7766. She also said "you may ask why State and local governments cannot just develop tests to screen out those individuals who may still retain their strength at the age of 60 or 70. However, there is no adequate test that can simulate the conditions that firefighters and police officers face in the line of duty." *Id.*

S. 553 was subsumed by the Omnibus Consolidated Appropriations Act for 1997. During the floor debates on September 30, 1996, Senator Jeffords opposed the amendment and denied that existing tests were inadequate to measure fitness for public safety positions. 142 Cong. Rec. 26658. Senator Moseley-Braun again spoke in favor of the amendment, and again addressed the insufficiency of existing tests as a substitute for mandatory retirement ages. *Id.* at 26722. She noted that the amendment provided for a study of appropriate fitness tests, and said that "[t]he provision also includes an exception to the exemption whereby [the National Institutes of Occupational Safety and Health, an agency of HHS] will identify valid job performance tests and public safety agencies utilizing mandatory retirement ages will provide public safety officers who have reached retirement age with an annual opportunity to demonstrate their fitness using the [HHS] tests." *Id.*

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The Omnibus Act, including the amendment to § 623(j), passed on September 30, 1996. Pub.L. 104-208.

The legislative history points toward the second interpretation: that § 623(j) reinstated the public safety exemption from 1986 allowing mandatory age-based retirement, without a sunset provision, but subject to the use of fitness tests *when and if* suitable tests were ever made available by HHS. The supporters expressed skepticism about existing fitness tests, and proposed mandatory retirement as an alternative. Although several legislators noted that the EEOC had failed to comply with the mandate of the 1986 amendments to develop tests, none of the them indicated that the 1996 exemption would expire if HHS failed to fulfill its mandate, and at least one referred to the amendment as "permanent." Thus I conclude that § 623(j) permits the City to enact a mandatory retirement ordinance without offering fitness tests if HHS has not developed appropriate tests.

The plaintiffs argue that this interpretation produces an absurd result that frustrates the purpose of the statute and ignores Congressional endorsement of fitness tests. However, the legislative history suggests that the intent of the amendment was to reinstate an exemption from the ADEA allowing for age-based retirement for public safety officials because fitness tests were unreliable, expensive, and had potential discriminatory effects on women and minorities. The provision in § 623(j)(1) for compliance with § 3(d)(2) merely imposed an obligation on employers to provide

tests when and if suitable tests became available; it did not make tests a condition precedent to the operation of the exemption. Because HHS has not promulgated the regulations called for by the statute, the City could not violate § 623(j)(1) by failing to provide fitness tests before enforcing the Ordinance.

2. Timing and Scope

The 2000 Ordinance covers all "sworn members" of the police department and all members of the "uniformed service" of the fire department, a broader class than the members of the "career service" covered by the ordinance in effect in 1983. The plaintiffs have argued, as support for their allegations of subterfuge, *see* below, that the City impermissibly broadened the scope of the Ordinance beyond its coverage as of March 3, 1983, in violation of § 623(j)(1)(A). *See Roche v. City of Chicago*, 24 F.3d 882, 884 (7th Cir.1994) (holding that, where plaintiff was in class of employees not covered by ordinance in effect on March 3, 1983, § 623(j) exemption was unavailable). However, *Roche* was decided before the 1996 amendments, which permitted mandatory retirement ordinances enacted after September 30, 1996, as long as the age was not lower than fifty-five. *See* § 623(j)(1)(B). The complaint alleges that the Ordinance was enacted on May 17, 2000, and establishes a retirement date of sixty-three. The plaintiffs argue in their surreply that the Ordinance is subject to the March 3, 1983, restriction in § 623(j)(1)(A) because it contains the same age that existed in the mandatory retirement provision in effect on that date. But § 623(j)(1)(B)(ii)

provides an alternative[5] "if applicable State or local law was enacted after September 30, 1996," in which case discharge is lawful if the officer has reached the higher of the age in effect under the new law or 55. Notably, § 623(j)(1)(B)(ii) does not refer to the enactment of a new "age," it says a new "law." The plaintiffs consistently argue that the 2000 Ordinance is different from earlier versions because the scope of coverage is broader. By the plain language of the statute, it is a new law that was enacted after 1996, so it falls within the requirements of § 623(j)(1)(B)(ii), and sixty-three was the age in effect in 1983, *id.* at (j)(1)(B)(ii)(I), so there is no violation based on the broader scope of coverage.

B. Section 623(j)(2): Subterfuge

The plaintiffs argue that the interpretation of § 623(j)(1) given above, allowing municipalities to broaden the scope of mandatory retirement ordinances by enacting new law, renders the "subterfuge" prohibition meaningless, but it is consistent with the statutory scheme if subterfuge means something more than a violation of the age limitations in (j)(1), and I hold that it does. Section 623(j) requires that mandatory retirement of public safety officials meet the requirements of subsection (1) *and* that it be "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter." § 623(j)(2). "[T]he term 'subterfuge' must be given its ordinary meaning as 'a scheme, plan, strategem, or

5. Section (j)(1) refers to attainment of the age in subsection (A) "or" (B).

artifice of evasion.' " *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 167, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989).

In *Kopec v. City of Elmhurst*, 193 F.3d 894 (7th Cir.1999), a case involving an age-based hiring criterion, the court noted that, "[t]o the extent that a hiring plan includes a maximum age of hire, what little case law there is on the subject suggests that the plan will not be considered a 'subterfuge to evade the purposes of [the] Act' so long as the age criterion pre-dates the ADEA (or its extension to the employees of state and local governments)." *Id.* at 901. The City argues that *Kopec* is controlling, and that the Ordinance is presumptively not a subterfuge because it provides for the same age of mandatory retirement as all previous versions of the City's mandatory retirement ordinance, including those that predate the ADEA. This position might seem to find some support in *Kopec*, but not when that opinion is read in its entirety.

After making the observation quoted above, the court in *Kopec* went on to consider the question of subterfuge separately from the age requirements in § (j)(1). There the only question presented on the issue of subterfuge was whether the challenged hiring plan qualified for the exception without "proof that the maximum hiring age amounts to a BFOQ, that is, a requirement 'reasonably necessary to the normal operation' of the city's police force." *Id.* The Seventh Circuit rejected this argument as a matter of law because that reading would collapse the exemption in § (j)(1) into

the BFOQ exception in § (f). *Id.* at 902. The Seventh Circuit was not presented with any evidence of subterfuge, so the court affirmed the grant of summary judgment against the plaintiff. Likewise, in *McCann*, on which the City relies, the court dismissed the subterfuge claim because the plaintiffs failed to "allege any facts to support a conclusion that the City amended its ordinance with the intent to circumvent the ADEA." 1990 WL 70415 at *4.

The Ordinance, on its face, states that its purpose is public safety, Pl's Ex. A, and the City argues that any inquiry into subterfuge should end here. However, the plaintiffs allege that the purpose of the Ordinance was not public safety; they claim that, in fact, the "Ordinance was enacted for the purpose of eliminating from the ranks of the Police [and Fire] Department[s] . . . officers who had surpassed 63 years of age so that, among other reasons, the City could promote younger police [and fire] officers within its . . . Department[s]." Drnek Compl. ¶ 17; *see also* Minch Compl. ¶ 23. At oral argument on March 8, 2000, the plaintiffs made additional factual allegations that the City's true purpose was to "make room for young people coming in" to the police and fire departments, citing public statements by the Ordinance's sponsor and by high-ranking City officials.[6]

The City objects that inquiry into the state of mind of the individual aldermen or City officials is irrelevant

6. I may consider the plaintiffs' additional factual narration without converting this motion to one for summary judgment. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir.2000).

and immaterial, citing *Pacific Gas Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), in which the Supreme Court noted, in the context of preemption, that it would "not become embroiled in attempting to ascertain [the state legislature's] true motive." *Id.* at 216, 103 S.Ct. 1713. The Court gave two reasons: first, that "inquiry into legislative motive is often an unsatisfactory venture." *Id.* Here the question of whether the Ordinance is indeed a subterfuge is one, ultimately, for the trier of fact, *EEOC v. Home Ins. Co.*, 672 F.2d 252, 262 (2d Cir.1982), and it is not for me to determine whether an inquiry into the City Council's motives would be an unsatisfactory venture or a revealing expedition. *See Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327 (7th Cir.1999) (Under Rule 12(b)(6) "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.").

The Court's second reason for disregarding evidence of the state legislature's "true motive," however, is more to the point. Under the preemption analysis in *Pacific Gas*, federal law preempted any state law that regulated nuclear waste disposal for public-safety purposes, but did not preempt state regulation of the same activities "for purposes other than protection against radiation hazards." *Id.* at 210, 103 S.Ct. 1713. Thus, the question was only whether there was a conceivable non-safety rationale for the state's legislation, *id.* at 213, 103 S.Ct. 1713, and the Court needed to look no further than the state statute's statement of purpose, which gave an

economic rationale, *id.* at 216, 103 S.Ct. 1713. The Court did not prohibit all inquiry into legislative motive; it held only that it was "pointless" in that case in light of the legal standard. *Id.*[7]

Federal preemption in *Pacific Gas* was a question of law, *id.* at 201, 103 S.Ct. 1713, but "subterfuge" under the ADEA is a question of fact, *Home Ins. Co.*, 672 F.2d at 262, and the City's "true motive" matters. In *Betts*, the Supreme Court held that "subterfuge," in the context of a pension benefit section of the ADEA, "connotes a specific 'intent to evade a statutory requirement.' The term thus includes a subjective element . . . ." 492 U.S. at 171, 109 S.Ct. 2854 (citations omitted). Thus the intent or desire of aldermen or other City officials is both relevant and material. A subterfuge analysis, like a pretext analysis under a traditional *McDonnell Douglas*-style analysis, necessarily requires the trier of fact to look beyond the defendant's statement of purpose or intent to see whether it is just an excuse or an "artifice of evasion" to cover-up otherwise prohibited conduct.

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7. The City also cites two equal protection cases in which the court employed rational basis review of legislation. *See Hearne v. Board of Educ. of the City of Chicago*, 185 F.3d 770, 775 (7th Cir.1999); *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir.1990). In both cases, the court rejected the argument that "legislation that otherwise passes the proper level of scrutiny . . . becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign." *Hearne*, 185 F.3d at 775. As in *Pacific Gas*, the legislators' motives were disregarded because they were irrelevant in light of the standard, not because such an inquiry is never permissible.

At oral argument, the City said that the inevitable result of mandatory retirement under § 623(j) is that there is more room to hire and promote younger employees. As a factual matter, this may be true, but it does not follow, as the City suggested during oral argument, that "making room" and other "favorable treatment of younger employees is a necessary component of discharge on the basis of age, which is lawful under the ADEA." Replacement of older employees by younger employees solely on the basis of age is precisely the type of discrimination that the ADEA was enacted to prevent. *See generally Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (Purpose of ADEA was to protect older employees from "inaccurate and stigmatizing stereotypes" that younger employees perform better.); *see also Home Ins. Co.*, 672 F.2d at 262 ("[E]xplicit appeal to [benefit of] the 'young,' " was sufficient to raise question of fact about defendant's motivation to subvert the purpose of the ADEA). Age-based retirement is tolerated in limited circumstances under § 623(j), but not for the wrong reasons, *i.e.*, not for reasons that are merely a cover-up for the type of ageism prohibited by the ADEA.

The City argues that requiring it to demonstrate that the purpose of the Ordinance is public safety would have the effect of imposing a BFOQ analysis under § 623(j), a result which the Seventh Circuit has forbidden. *See Kopec*, 193 F.3d at 902. This overstates the result. Although it is commonly referred to as the "public safety exemption," § 623(j) does not prescribe the permissible

purposes for mandatory retirement ordinances, but it does tell States and municipalities what the impermissible purposes are. It does not matter, therefore, whether age-based mandatory retirement is "reasonably necessary to the normal operation" of the police and fire departments under the BFOQ analysis; what matters is that the City does not use the public safety exemption as a means of achieving goals, such as cleaning house to "give[ ] young guys the opportunity to get promoted and . . . allow removal of deadbeats in the senior ranks,"[8] that are otherwise prohibited by the ADEA. Unlike the standards applied in *Pacific Gas* and the equal protection cases cited by the City, it is not enough that a permissible motive is conceivable; under § 623(j)(2), the wrong motive is fatal, even if a permissible motive can be imagined.

At oral argument, the plaintiffs provided additional factual narration suggesting that the introduction of the Ordinance was delayed, four years after Congress passed the 1996 amendment, until a close friend of the Mayor retired in 2000 at age 68. In *Kopec*, the Seventh Circuit held that the safe harbor of § 623(j) is available "for *all* States and municipalities that had age limits in place in 1983, not just to those that have chosen to keep restrictions in place in the ensuing years." 193 F.3d 894, 900 (emphasis in original). However, that discussion related only to whether the age requirements in question satisfied the requirements of § 623(j)(1). *Id.* at 900. The

8. This statement, offered by the plaintiffs at oral argument, is attributed to Alderman Beavers, the sponsor of the Ordinance, in a February 2, 2000 article in the *Chicago Tribune*.

plaintiff there did not argue that suspicious timing was evidence of subterfuge, and the court did not address the issue. In fact, suspicious timing of enactment could not have played a role in that case because the city there had not actually reenacted its ordinance at the time of the adverse employment action. *See id.* at 905 (Posner, J., dissenting). Drawing all inferences in favor of the plaintiffs at this juncture, the four-year delay in reenactment and the coincidental retirement of the mayor's friend, if true, could, depending upon what other evidence was presented, warrant an inference that public safety was not a dominant concern for the City.

The plaintiffs also argue that the Ordinance impermissibly expands the scope of its coverage beyond what it was on March 3, 1983 by including a broader class than the members of the "career service" that were covered by the ordinance in effect in 1983. They cite *Roche*, 24 F.3d at 885-86, for the proposition that any ordinance that is broader in scope than the ordinance in effect in 1983 is a subterfuge to evade the ADEA, but *Roche* did not address the question of subterfuge, and, more importantly, it was decided under the 1986 exemption, which did not contain the provision for new laws that is in the 1996 amendment. *See* 29 U.S.C. § 623(j)(1)(B)(ii).[9] I have already held, because the

9. The plaintiffs also cite *Stewart v. City of Chicago*, No. 92 C 4919, 1994 WL 46672 (N.D.Ill. Feb 14, 1994) (Grady, J.), in support of this proposition, but *Stewart* was also decided under the 1986 amendment, so its implicit holding that a violation of § (j)(1) is evidence of subterfuge, *id.* at *4, even if correct under the earlier statute, is not dispositive here.

Ordinance is a new law, that its broader scope does not violate § (j)(1)(B)(ii), and the plaintiffs offer no support for the proposition that action consistent with the requirements of the ADEA, by itself, could support an inference of subterfuge.

Finally, the City argues that the Ordinance cannot be read in isolation, and that it is part of an overall system of retirement benefits that is "bona fide" in the sense that it is a legitimate, benefit-paying retirement system, *see Kopec*, 193 F.3d at 901, and that the whole retirement system is not a subterfuge. However, at least one court has rejected the argument that a "bona fide" plan is *ipso facto* "not a subterfuge," because if "bona fide" and "not a subterfuge" meant the same thing, Congress would have had no reason to use both phrases. *Home Ins. Co.*, 672 F.2d at 260; *see also Kopec*, 193 F.3d at 902 (interpreting § 623(j)(2) to require that a hiring plan be both "bona fide *and* not a subterfuge") (emphasis added). Moreover, a "bona fide" hiring or retirement plan is only one "that is genuine and pursuant to which actual hiring [or retirement] decisions are made," *id.* at 901; to say that a bona fide plan cannot be a subterfuge to evade the purposes of the ADEA requires an inference that the only purpose of the ADEA is orderly payment of retirement benefits, and that is clearly not so. *See Home Ins. Co.*, 672 F.2d at 260. Finally, the City's argument fails logically. If the Ordinance is merely part of the overall system of retirement benefits, and the Ordinance is a subterfuge, then it cannot be that the overall system is not also, at least in part, a subterfuge. The plaintiffs state a claim for a violation of the ADEA under the subterfuge provision of § 623(j)(2).

Appendix D

III. Due Process

To state a Fourteenth Amendment claim for the deprivation of a property interest without due process, the plaintiffs must (1) show that they have a constitutionally protected property interest,[10] and (2) allege that they were deprived of this interest without due process. *Kim Constr. Co., Inc. v. Board of Trustees of Village of Mundelein*, 14 F.3d 1243, 1245 (7th Cir.1994). The City originally argued only that there is no property interest, but after the plaintiffs raised the issue in their response, the City argued that the process provided under the plaintiffs' collective bargaining agreements was adequate. However, the cases that it cites stand only for the proposition that due process *may* be satisfied by procedures in collective bargaining agreements. What procedures were provided for under the agreements in this case and whether they were actually available to the plaintiffs are factual questions that must be resolved in favor of the plaintiffs for the purposes of this motion, and the City does not argue that the agreements are facially dispositive of this issue, so dismissal on this ground is not proper. Therefore only the existence of a property interest is at issue here.

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10. The existence of a liberty or property interest is a threshold requirement for a due process claim under the Illinois Constitution, *East St. Louis Federation of Teachers v. East St. Louis Sch. Dist. No. 189*, 178 Ill.2d 399, 227 Ill.Dec. 568, 687 N.E.2d 1050, 1060 (1997), so the analysis is the same for the state and federal claim.

"Property interests 'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ....' " *Ledford v. Sullivan*, 105 F.3d 354, 357 (7th Cir.1997). "[F]ederal property interests under the 14th Amendment usually arise from rights created by state statutes, state or municipal regulations or ordinances, and contracts with public entities." *Ulichny v. Merton Cmty. Sch. Dist.*, 249 F.3d 686, 700 (7th Cir.2001). Furthermore, " 'property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, property denotes a broad range of interests that are secured by existing rules or understandings.' " *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)).

The City attached portions of the police and firefighters' collective bargaining agreements ("CBA") to its motion to dismiss. Both the police and the firefighters CBAs have been ratified by the Chicago City Council, and although they are not codified in the Municipal Code, they are ordinances of which I may take judicial notice under Fed.R.Evid. 201(d), and I may consider them without converting the motion to one for summary judgment. *See Menominee Indian Tribe*, 161 F.3d at 456; *Newcomb*, 558 F.2d at 829.

Appendix D

A. Firefighters

Section 16.2B of the firefighter's CBA states that "employees shall be disciplined and discharged only for just cause." Pl.'s Ex. J. The plaintiffs argue that nothing in the firefighters' contract suggests that attaining age sixty-three is cause for termination. Section 13.1 of the CBA also states that the City shall not discriminate against any employee covered by the CBA on the basis of age, among other things.[11] Pl.'s Ex. J. Article XIX of the CBA states that ratification of the CBA by the City Council commits the City to enact no subsequent ordinances[12] that would impair the enforcement of any of the CBA's terms. *Id.* Furthermore, Illinois law states that "any collective bargaining contract between a public employer and a labor organization executed pursuant to [the Illinois Public Labor Relations] Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents." 5 ILCS 315/15(b).

Under the CBA, the firefighter plaintiffs had a legally protected interest in continued employment,

11. Section 13.1 states that "[i]n accordance with applicable law, neither the Employer nor the Union shall discriminate against any employee covered by this agreement because of race, creed, color, national origin, sex age, religion or political affiliation."

12. The Ordinance was enacted on May 17, 2000, subsequent to ratification of the CBA on January 14, 1998.

see Roman v. United States Postal Serv., 821 F.2d 382, 386 (7th Cir.1987) (finding property interest based on collective bargaining agreement that provided for termination only for "just cause"), and the nondiscrimination provision in the CBA extends that interest to include protection from discharge on the basis of age. For the purposes of this motion, I must take as true the plaintiffs' allegation that they were fired solely because of their age, so they have stated a claim for a deprivation of a property interest.

The plaintiffs' claim to a property right based on the nondiscrimination provision is distinguishable from a mere expectation of fairness. The Seventh Circuit has held that, where a state statute and municipal ordinance guaranteed that civil service promotion examinations would be fair, that guarantee of fairness did not rise to the level of a property interest where there was no underlying entitlement to the promotion itself. *See Bigby v. City of Chicago*, 766 F.2d 1053, 1056-57 (7th Cir.1985); *see also McMenemy v. City of Rochester*, 241 F.3d 279, 287 (2d Cir.2001) ("But because [the plaintiff] had no legitimate claim of entitlement to-and therefore no property interest in-the position to which he aspired, the procedures used to fill that job are immaterial to his due process claim."). Here, however, the promise not to discriminate runs to a job in which the firefighter already has an entitlement, and the promise enhances the existing protection in contemplation of naked age discrimination, which is alleged to have occurred here.

In reply, the City points to § 9.1(C) of the CBA, which states that, in addition to a disciplinary termination for "just cause," a firefighter's employment may be terminated when he "[r]etires or *is retired.*" Reply at 25. The City argues that the "retires *or is retired* " language contemplates mandatory retirement, but I must view the CBA in its entirety; a "contract is to be interpreted from an examination of the complete document and not an isolated part." *Western Cas. & Sur. Co. v. Brochu*, 105 Ill.2d 486, 86 Ill.Dec. 493, 475 N.E.2d 872, 876 (1985). The passive "is retired" language must be read as subject either to the provision for disciplinary discharge for "just cause," or to the nondiscrimination clause, if either of those provisions is to be afforded meaning. *See Leahy Realty Corp. v. American Snack Foods Corp.*, 253 Ill.App.3d 233, 192 Ill.Dec. 801, 625 N.E.2d 956, 966 (1993) ("Courts should avoid giving an interpretation to a provision that will nullify the clear and unambiguous language of another provision."). Nor is the "in accordance with applicable law" provision in § 13.1 dispositive; I have already concluded that the plaintiffs state a claim for a violation of the ADEA, so they have also stated a claim for a violation of the City's contractual obligation to abide by the law. The firefighter plaintiffs have sufficiently alleged the deprivation of a property interest.

B. Police

The police CBA also contains a nondiscrimination provision, but that provision contains a limitation: "Nothing in this Agreement shall be deemed to preclude

the mandatory retirement of any officer upon or after the attainment of age 63." Ex. M, § 10.2. Unlike the firefighters' CBA, then, the nondiscrimination provision here does not create a property interest in employment after age sixty-three. The plaintiffs do not respond to the City's argument that the CBA does not provide a property interest for police officers age sixty-three or older, but argue only that "there can be no doubt that this provision was intended to be enforced in a lawful manner and without waiving due process." Resp. at 32. There can be no due process violation without a property interest, however, *see Kim Constr. Co.*, 14 F.3d at 1245, and the plaintiffs have not identified any provision of the police CBA that creates such an interest.[13] The plaintiffs argue that "[t]o the extent that the collective bargaining agreements for police officers permitted the City to engage in mandatory retirement, they did not permit the City to use mandatory retirement as a means to engage in arbitrary and capricious age discrimination." Resp. at 32. At best this argument may be construed as saying that both the mandatory retirement ordinance and the police CBA violate the ADEA, but attacking the validity of the CBA does not demonstrate that the intent of the parties to the CBA was to establish a property interest in employment after age sixty-three.

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13. For the same reasons, the plaintiffs' claim that a property interest is created by § 2-74-050(1), which provides that career service employees may only be discharged "consistent with the requirements of due process of law," must fail. No process is due if there is no property interest.

Beyond the CBA, the plaintiffs point to several rules and ordinances, but none of them establishes a protectable property interest in employment after the age of sixty-three. They cite to a district court case about reinstatement for the proposition that certain City personnel rules create a property interest, *see Townsend v. City of Chicago,* No. 87 C 6097, 1988 WL 61162, at *2 (N.D.Ill. June 3, 1988) (Parsons, J.), but they do not identify which specific City rules allegedly create a protected interest here. In any event, the statement in that case that "under these rules all 'permanent' Career Service employees have a property interest in their continued employment" is dictum, because the question there was whether the plaintiff, who had resigned but was placed on a reappointment list had a property interest in prospective employment. *Id.* at *2-3. The case cited by the *Townsend* court for that proposition found the property interest based on a memorandum, and held only that the City rules and ordinances defined the process due. *See Fontano v. City of Chicago,* 820 F.2d 213, 215-16 (7th Cir.1987).

The plaintiffs argue that the City's nondiscrimination ordinance, CMC § 2-74-080, creates a property interest in employment after age sixty-three because it prohibits discrimination based on age. Unlike the nondiscrimination provision in the firefighter's CBA, which imposes a contractual obligation on the City to obey nondiscrimination laws, the freestanding nondiscrimination ordinance does not come as part of a package of obligations that includes continuing employment. Without a connection to an existing

property interest, a promise of nondiscrimination is no more than a mere expectation of fairness. *See Bigby*, 766 F.2d at 1056-57. Even if the plaintiffs could state a claim for a violation of the nondiscrimination ordinance, that standing alone would not create a property interest.

Moreover, the Chicago Commission on Human Relations ("CCHR") has held that the City's Human Rights Ordinance, CMC § 2-160-030,[14] which forbids age discrimination, is superseded by the mandatory retirement Ordinance. *See In the Matter of Minch et al.*, Nos. 01-E-21/44/48 (CCHR Aug. 24, 2001) (slip op.). It held that, to the extent that the two ordinances conflicted, the mandatory retirement Ordinance, as the more recent and more specific of the two, controlled, and that the only way to read the two ordinances together and give effect to both was to hold that the mandatory retirement Ordinance created an exception to the human rights ordinance. *See id.* at 16. I find this reasoning persuasive, and conclude that because the human rights ordinance has been "amended silently," *id.*, to allow mandatory retirement at age sixty-three, it cannot provide the basis for a property interest.

The same reasoning also applies to the plaintiffs' argument that the municipal code provides procedural protections for discharged police officers. The provision they cite in support of this, CMC § 2-84-030, states that "[n]o officer or employee of the police department in the classified civil service of the city . . . may be removed or

14. § 2-74-080 incorporates chapter 2-160 by reference.

discharged, or suspended . . . except for cause upon written charges and after an opportunity to be heard in his own defense by the police board." Read together with the more recent and specific mandatory retirement Ordinance, it cannot create a property interest in employment after age sixty-three. Furthermore, the sentence cited by the plaintiffs appears in a paragraph describing the police board's power to conduct disciplinary hearings. Because there is no allegation that any of the plaintiffs were discharged for disciplinary reasons, this section does not apply here.

Finally, the plaintiffs claim that they have a property interest in their pension benefits because the Illinois constitution guarantees that membership in a pension plan is a contractual relationship, "the benefits of which shall not be impaired." Ill. Const. Art. XIII, § 5. Specifically, they claim that any purported class members who have not reached minimum vesting in their pensions ("unvested plaintiffs") have a right not to have their benefits reduced by forfeiture of the City's contribution, and that members of the class whose pensions have reached minimum vesting ("vested plaintiffs") have a right not to have their benefits capped by not receiving future annual raises.[15]

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15. Because the class certification issue has not been presented to me, I address only the claims of the individual plaintiffs, but neither party identifies the vesting status of the named plaintiffs, so I address arguments on behalf of both vested and unvested police officers.

The claim as to vested plaintiffs has been rejected by the Illinois Supreme Court. *See Peters v. City of Springfield*, 57 Ill.2d 142, 151-52, 311 N.E.2d 107 (1974). In *Peters*, the City of Springfield enacted an ordinance lowering the mandatory retirement age from sixty-three to sixty. *Id.* at 108. The plaintiffs, three firemen retired under the ordinance, sued, among other reasons, on the ground that the ordinance interfered with their pension rights in violation of Article XIII, § 5. *Id.* at 111. Under the pension plans, firemen over the age of fifty with twenty or more years of service were entitled upon retirement to a monthly pension equal to fifty percent of their annual salary, subject to annual one percent increases up to a maximum of sixty-five percent. *Id.* The plaintiffs, who were vested respectively at fifty-two percent, fifty-eight percent, and sixty-five percent at the time of their retirement, argued that they had a constitutionally protected right to work until they reached sixty-five percent or age sixty-three, whichever was sooner. *Id.* The court noted that because the pension plan was based on salary and length of service, there were many variables that could affect the amount of the pension, including changes in employment status. *Id.* at 112. The City of Springfield and *amicus curiae* (including the City of Chicago) argued that the right to work until a certain age or until maximum vesting was not a "pension benefit" protected by § 5. The court agreed, and held that § 5 "was not intended, and did not serve, to prevent the defendant City from reducing the maximum retirement age, even though the reduction might affect the pensions which plaintiff would ultimately have received." *Id. Peters* is controlling, so

neither § 5 nor Illinois pension laws create a protectable interest in employment beyond the age of mandatory retirement. *See also Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167, 181-82 (1995) ("Although participation in a government pension system and forbearance in seeking other employment create an employee's contract right to pension benefits under [the state constitution], such participation does *not* create contract rights to government employment."). The plaintiffs do not explain why this rule should not also be applied to any unvested plaintiffs, whose entitlement to benefits under the pension laws is weaker, not stronger.

The plaintiffs acknowledge the holding of the Illinois Supreme Court in *Peters*, but argue that it is "not dispositive" of all of their Illinois due process claims, and that it does not "negate decisions of the Seventh Circuit which acknowledge the existence of protect[a]ble 14th amendment Due Process claims with respect to pension benefits." (Citing *Buttitta v. City of Chicago*, 9 F.3d 1198 (7th Cir.1993)). *Buttitta* involved a plaintiff who had been placed on disability leave, but not terminated, who claimed that the Illinois Pension Code created a property right to demonstrate his fitness for active duty. *Id.* at 1202. The court construed a section of the Pension Code that provided for transfer of an officer on disability leave between the Pension Board and the Police Department. *See* 40 ILCS 5/156. Noting that "the statute's language is directed primarily toward the prevention of fraudulent disability claims," the court held that "§ 5-156 created in police officers a property interest to the extent that police officers who have been disabled

may not be deprived of the opportunity to demonstrate their fitness for active duty." *Id.* at 1204. But § 5-156 does not apply here, because the plaintiffs were not on disability leave, and they have identified no similar provision of the Pension Code that would create such interests in the case of mandatory retirement.

The plaintiffs also cite to *Swick v. City of Chicago*, 11 F.3d 85 (7th Cir.1993), for the proposition that the court could "imagine a case in which a period of forced inactivity impeded promotional opportunities or had indirect effects on post-retirement income." But those facts were not presented to the Seventh Circuit, so it never reached the question of whether the plaintiff actually had an entitlement to the lost income and opportunities. If it had reached the question, it would have run into *Peters*, where the Illinois Supreme Court held that such an indirect effect was insufficient to trigger the protections of Illinois law regarding pensions, 311 N.E.2d at 112, and it is state law, not federal law, that creates the property rights protected by the Fourteenth Amendment, *see Ledford*, 105 F.3d at 357. The police plaintiffs have failed to identify a state law that creates an entitlement to due process upon mandatory retirement at age sixty-three, so they cannot state a claim for a deprivation of due process.

Appendix D

IV.

The City's motion to dismiss is DENIED as to the .DEA claims of all of the plaintiffs. The motion is also)ENIED as to the due process claims of the firefighter laintiffs, Minch and Graf. The motion is GRANTED as o the due process claims of the police plaintiffs, Drnek .nd Cosentino.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 11, 2007

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 11, 2007

Before

Honorable RICHARD D. CUDAHY, *Circuit Judge*

Honorable DANIEL A. MANION, *Circuit Judge*

Honorable ILANA DIAMOND ROVNER, *Circuit Judge*

No. 05-2702

JAMES D. MINCH and RICHARD A. GRAF,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

Appendix E

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 01 C 2586

Samuel Der-Yeghiayan, Judge.

ORDER

No judge of the court having called for a vote on the Petition for Rehearing and Rehearing En Banc filed by Plaintiffs-Appellants on May 29, 2007, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing and Rehearing En Banc is DENIED.